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FRUIT OF THE PHILADELPHIA TREE: TOXIC FOR STATE REGULATION OF OUT-OF-STATE WASTE

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Preservation and protection of natural resources is a growing concern, and society is becoming more attuned to humanity's impact on the environment. Largely in response to public sentiment, Congress mandated the creation of the Environmental Protection Agency (EPA)[1] and enacted several environmental statutes, including the Clean Water Act,[2] the Resource Conservation and Recovery Act (RCRA),[3] and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[4] Treatment, storage and disposal of waste[5] is addressed by these and other regulations. Each American

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1. Formally created on December 2, 1970, the EPA assumed many responsibilities formally delegated to the Department of the Interior and the Department of Agriculture. J. GORDON ARBUCKLE, ET AL., ENVIRONMENTAL LAW HANDBOOK 475 (10th ed. 1989).

2. Pub. L. No. 95-217, 91 Stat. 1567 (1977) (codified as amended at 33 U.S.C. §§ 1251-1387 (1988)). The Clean Water Act addresses four specific areas: surface water discharges, discharges into publicly-owned sewer systems, wetlands protection, and spills of oil and hazardous substances. The Act addresses discharges into the nation's waters through regulation of direct industrial surface water discharges and discharges to and from Publicly Owned Treatment Works (POTWs). ARBUCKLE, ET AL., *supra* note 1, at 177-258.

3. Pub. L. No. 94-550, 90 Stat. 2796 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992 (1988)). RCRA addresses solid and hazardous waste management. RCRA's cradle-to-grave program regulates hazardous waste throughout extensive permitting and chain of custody requirements, from generation through final disposal at Treatment, Storage, and Disposal facilities. By structuring the entire solid waste regulatory process, RCRA affects all individuals who generate, transport, treat, store, or dispose of hazardous waste. *See generally*, ARBUCKLE, ET AL., *supra* note 1, at 563-606.

The federal government initially became involved in the solid waste regulatory process with passage of the Solid Waste Disposal Act of 1965, Pub. L. No. 89-272, tit. II, 79 Stat. 997, later amended by the Resource Recovery Act of 1970, codified at 42 U.S.C. §§ 6901-6987. Not until passage of the Resource Conservation and Recovery Act (RCRA) of 1976 was the federal role "significantly expanded." FACING AMERICA'S TRASH: WHAT NEXT FOR MUNICIPAL SOLID WASTE, 101st Cong., Office of Technology Assessment 348 (1989).

4. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)). CERCLA addresses potential environmental threats not covered by RCRA, including regulation of abandoned waste sites. CERCLA allows the federal government to respond to releases or threatened releases of hazardous substances, pollutants, and contaminants that potentially may endanger the public health or the environment. *See generally*, ARBUCKLE, ET AL., supra note 1, at 75-124.

5. "Waste" is a general term which for the purposes of this article refers to solid waste rather than hazardous waste, both of which are defined by the RCRA regulations. *See infra* part III.A.

generates between 2.9 and 8.6 pounds of waste each day.[6] American homes and businesses generate over 195 million tons of trash in a single year;[7] the EPA projects that Americans will throw away 222 million tons of waste per year by 2000.[8] Despite public awareness of waste's intrinsic danger, waste generation has escalated at an alarming rate in this country.[9] The reality is that land is a finite resource.[10] Ultimately, demand will exceed capacity.[11]

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6. *Curbing Waste in a Throwaway Society*, REPORT OF THE TASK FORCE ON SOLID WASTE MANAGEMENT 6 (Nat'l Governors Ass'n, Washington D.C.) (1990).

7. *Characterization of Municipal Solid Waste in the United States: 1992 Update*, EPA REPORT ES-3 (OS-305) (July 1992) (on file with author). Approximately 66.6% of municipal solid waste is relegated to landfills, 16.3% is incinerated, and 17.1% is recycled. *Id.* at ES-5. The preferred hierarchy of waste management is as follows: source reduction, recycling, waste combustion, landfilling. *See The Solid Waste Dilemma: An Agenda For Action*, Office of Solid Waste, 17-19 (February 1989). See Appendix 1 for additional, state-by-state data on waste disposal.

8. *Characterization of Municipal Solid Waste, supra* note 7, at ES-3.

9. "Between 1960 and 1988, municipal solid waste more than doubled, while the U.S. population grew by only 36 percent." *Curbing Waste, supra* note 6, at 6.

A serious problem is the great discrepancy in information concerning waste disposal and landfills. For example, surveys conducted in 1990 and 1991 reflected the total number of American landfills to range between 5,368 and 7,373. A 1986 EPA survey indicated that there were 6,034 active landfills in the country; however, this figure did not reflect the 2,000 landfill closures that EPA estimated by 1992. A 1988 U.S. Government Accounting Office survey calculated that 7,575 landfills existed. The total number of landfills existing in this country in 1990-1991 fluctuated from 4,462 to 10,467. Edward W. Repa & Susan K. Sheets, *Landfill Capacity in North America*, WASTE AGE, May 1992, at 20-21.

For a specific state illustration of the waste crisis, see *IEPA Compiling Figures of Solid Waste Imports—Solid Waste Landfill Numbers Still Decline*, ENVTL. PROGRESS, Nov.-Dec. 1992, at 10, 11. An Illinois study of thirty non-hazardous solid waste landfills reported a projected total of 3,250,000 cubic yards of solid waste imports in 1992. Out-of-state waste made up fifty percent or more of the total amount disposed of at seven landfills. Statistics show the number of active solid waste landfills in the State has declined rapidly:

YEAR	NUMBER OF ACTIVE LANDFILLS
1987	146
1988	133
1989	126
1990	117
1991	110
1992	106

Id.

10. Thirty-seven states closed over 2,200 dumps from 1986 to 1991, while 41 states granted permits for only 364 new landfills. Tom Arrandale, *Talking Trash*, GOVERNING GUIDE, Sept. 1992, at 34, 50.

11. The National Solid Waste Management Association and BioCycle surveys reflect the following:

- Connecticut, Georgia, Kentucky, North Carolina, Rhode Island, Vermont, Virginia, and West Virginia anticipate fewer than five remaining years of landfill capacity;
- Mississippi and New Jersey may have less than five years of remaining capacity;

Population density bears little correlation to the number of waste sites in a specific geographic region. Waste from densely populated areas is increasingly transported hundreds and often thousands of miles from its place of origin.[12] Lower tipping fees are largely responsible for the waste migration.[13] Waste disposal has largely become an economic issue, rather than an issue of responsibility.[14]

This waste migration causes a multitude of problems that recipient states are not prepared to handle.[15] Consequences associated

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- Thirteen states anticipate between five and ten remaining years of landfill capacity (Alabama, Arkansas, Florida, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Minnesota, Missouri, New York, Ohio, and Wisconsin);
- Maine, Michigan, Montana, Nebraska, and New Hampshire may have five to ten years of remaining capacity.

Edward W. Repa & Susan K. Sheets, *Landfill Capacity in North America*, WASTE AGE, May 1992, at 18, 26.

12. For example, New York City disposes nearly all of its daily 13,000 tons of commercial solid waste by transporting it outside the city. The following illustrates the breakdown of New York City's commercial waste recipients:

Pennsylvania	35%
Ohio	19%
West Virginia	13%
New York State	13%
Indiana	11%

The remainder of the commercial waste goes to Connecticut, Florida, Illinois, Kentucky, Maryland, Missouri, and Virginia. Brian Ketcham, *Exporting Commercial Waste From New York City*, WASTE AGE, Aug. 1991, at 63, 63.

13. "Tipping fees" are the amounts landfills or other waste facilities charge for accepting incoming waste. The assessment usually includes state and local taxes and varies depending upon the cargo size. Commercial clients with long-term commitments may pay a reduced price. Other facilities may avoid charging these fees by limiting access to local residents and sanitation crews. C.L. Pettit, *Tip Fees Up More than 30% in Annual NSWMA Survey*, WASTE AGE, Mar. 1989, at 101, 106.

Between 1982 and 1988, landfill tipping fees increased an estimated 149% nationally. The National Solid Wastes Management Association's (NSWMA) 1988 tipping fee survey revealed the estimated regional disposal costs around the country: $45.48 per ton in the Northeast, $17.95 per ton in the Midwest, $15.87 per ton in the South and $13.06 per ton in the West. *Id.* at 105.

A later NSWMA survey released in December 1991, which included a larger sample population, reflected an increase in the 1988 fees. The 1990 estimated regional tipping fees were: $64.76 per ton in the Northeast, $23.15 per ton in the Midwest, $16.92 per ton in the South, $25.63 per ton in the West, $11.06 per ton in the West Central, and $12.50 per ton in the South Central. John T. Aquino, *NSWMA Releases Expanded Tipping Fee Survey*, WASTE AGE, Dec. 1991, 24, 24.

14. West Virginia has countered this growing phenomenon by passing legislation that limits the amount of trash disposed of at state landfills to 30,000 tons per month. *Law Restricts Size of Landfills in West Virginia*, 22 Env't Rep. (BNA) 1844 (Nov. 29, 1991). The law was enacted partly in response to an industry proposal to develop a landfill in the state's poorest county that would accept 300,000 tons of waste each month. However, the law includes a provision that allows the disposal limit to be increased to 50,000 tons per month if the county approves in a general election referendum vote. John T. Aquino, *The Politics of Landfills*, WASTE AGE, Mar. 1993, at 37, 38.

15. For example, imported waste disposed at Indiana landfills "increased from a negligible amount in 1987 to an estimated 20 to 30% of all municipal solid waste" disposed of at Indiana landfills in 1990. *Curbing Waste, supra* note 6, at 38.

with waste disposal include disease and illness caused by exposure to waste, reduced capacity for disposal of in-state waste, inspection costs, dangers related to waste transport, and the public nuisances of odor and unsightliness.[16]

Due to the many concerns posed by waste and its ultimate disposal, many states have strived to limit waste importation.[17] These efforts have included regulation in accordance with state police powers, regional waste management planning, differential tipping fees, and reciprocal agreements. This article examines several state efforts to curb waste migration and the impact of the Commerce Clause,[18] federal environmental legislation, and judicial precedent on these efforts. The article concludes with an assessment of realistic alternatives for states to consider in addressing the current waste crisis.

I. STATE REGULATION OF SOLID WASTE

A. *State Regulation in Accordance With the Commerce Clause:* City of Philadelphia v. New Jersey

The Supreme Court first examined a state's right to close its borders to out-of-state waste in *Philadelphia v. New Jersey*.[19] The case involved a New Jersey statute that prohibited out-of-state waste importation,[20] but narrowly exempted specified classes of waste.[21]

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16. *See infra* Part III.A.1 and 2.

17. For an overview of state legislative activity directed at waste importation, see Bruce J. Parker & John H. Turner, *Federal/State Issues Under RCRA*, 21 CHEM. WASTE LIT. R. at 48, 51 (Dec. 1990).

18. U.S. CONST. art. I, § 8, cl. 3 provides, "Congress shall have Power . . . to regulate Commerce . . . among the several States . . ." In considering the effect of the Commerce Clause on state economic activity, "'[w]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.'" H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 537-38 (1949) (citing Baldwin v. G.A.F. Seelig Inc., 294 U.S. 511, 527 (1935)).

Although the Commerce Clause does not directly place restrictions upon the states, its indirect impact on interstate commerce is referred to as the dormant Commerce Clause. The Supreme Court alluded to the dormant Commerce Clause in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) and formally adopted it in Case of the State Freight Tax, 15 Wall. 232 (1873). For a general overview of the dormant Commerce Clause and its impact on the current waste crisis, see David Pomper, Note, *Recycling* Philadelphia v. New Jersey: *The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. PA. L. REV. 1309 (1989). Commerce Clause doctrine has been inconsistently applied. *See* Tyler Pipe Indus. v. Department of Revenue, 438 U.S. 232, 260-62 (1987) (Scalia J., dissenting) (criticizing the Supreme Court's application of the dormant Commerce Clause in his review of Court decisions).

19. Philadelphia v. New Jersey, 437 U.S. 617 (1978).

20. The statute read in pertinent part:

> No person shall bring into this State any solid or liquid waste which originated or was collected outside the territorial limits of the State, except garbage to be fed to swine in the State of New Jersey, until the commissioner [of the State Department of Environmental Protection] shall determine that such action can be permitted without endangering the public health, safety and welfare and has promulgated

Operators of several private New Jersey landfills and several cities holding contracts with the New Jersey operators brought suit against New Jersey and its Department of Environmental Protection. The trial court struck down the legislation as unconstitutional, holding that it inhibited interstate commerce.[22] The New Jersey Supreme Court subsequently upheld the constitutionality of the legislation, determining that it advanced health and environmental objectives without economic discrimination and with little burden on interstate commerce.[23]

The Supreme Court reversed the New Jersey Supreme Court decision. The Supreme Court perceived the facially discriminatory legislation as simple economic protectionism implemented by the State to isolate itself from consequences associated with disposal of out-of-state waste.[24] Therefore, it indirectly applied an elevated scrutiny[25] analysis to assess the constitutionality of the New Jersey

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regulations permitting and regulating the treatment and disposal of such waste in this State.

N.J. STAT. ANN. § 13:1I-10 (West Supp. 1978).

21. The ban excluded:

(1) Garbage to be fed to swine in the State of New Jersey;

(2) Any separated waste material, including newsprint, paper, glass and metals, that is free from putrescible materials and not mixed with other solid or liquid waste that is intended for a recycling or reclamation facility;

(3) Municipal solid waste to be separated or processed into usable secondary materials, including fuel and heat, at a resource recovery facility provided that not less than 70 percent of the thru-put of any such facility is to be separated or processed into usable secondary materials;

(4) Pesticides, hazardous waste, chemical waste, bulk liquid, bulk semi-liquid, which is to be treated, processed or recovered in a solid waste disposal facility which is registered with the Department for such treatment, processing or recovery, other than by disposal on or in the lands of this State.

N.J. ADMIN. CODE 7:1-42 (Supp. 1977).

22. *Philadelphia*, 437 U.S. at 619.

23. Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 348 A.2d 505 (N.J. 1975), *vacated*, Philadelphia v. New Jersey, 437 U.S. 617 (1978).

24. 437 U.S. at 626-27.

25. Under an elevated (strict) scrutiny analysis, the state has the burden of proving that facially discriminatory legislation or legislation having discriminatory effects: (1) is related to a legitimate local purpose; (2) serves that purpose; and (3) alternative means would not be as effective in promoting the purpose without discriminating against interstate commerce. Government Suppliers Consolidating Servs., Inc. v. Bayh, 753 F. Supp. 739, 763 (S.D. Ind. 1990) (citing Hughes v. Oklahoma, 441 U.S. 322, 336 (1979), Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977), and Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951)).

In declaring the New Jersey legislation unconstitutional because of its protectionist nature, the *Philadelphia* Court did not specifically identify the components of the elevated scrutiny test. However, at least one court has concluded that the *Philadelphia* Court indirectly applied a strict scrutiny analysis, stating:

> Although the second factor [in a strict scrutiny analysis], concerning alternative means, avoided express mention in *Philadelphia*, it appears the Supreme Court considered this factor when it noted that "it may be assumed that New Jersey may

legislation. Determining that solid waste was barred from New Jersey landfills on the basis of its origin,[26] the Supreme Court held that the statute's discriminatory impact on out-of-state waste was unconstitutional.[27] In addressing the Commerce Clause issue, the Court held:

> But whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently. Both on its face and in its plain effect, ch. 363 violates this principle of nondiscrimination.[28]

The Court acknowledged that the balancing test enunciated in *Pike v. Bruce Church*[29] applies when assessing the constitutionality of facially nondiscriminatory legislation; however, it rejected application of the *Pike* test because of the statute's substantial impact on interstate commerce.[30]

The Supreme Court's decision can be contrasted with that of the New Jersey Supreme Court. The New Jersey court recognized the statute was grounded in health and environmental concerns, rather than any economic benefit the State might derive from discriminating against out-of-state waste.[31] Unlike the Supreme Court, which saw

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> pursue [its legislative] ends by slowing the flow of *all* waste into the State's remaining landfills . . . ." 437 U.S. at 626. In other words, there existed a less discrim.inatory alternative that would allow the protection of New Jersey's environment—banning all disposal of waste in the state's landfills.

Bill Kettlewell Excavating, Inc. v. Michigan Dep't of Natural Resources, 732 F. Supp. 761, 764 (E.D. Mich. 1990), *vacated*, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992).

26. Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978). It should be noted that the Court based its decision on the premise that New Jersey was banning out-of-state waste from its landfills solely on the basis of origin. Thus, one may conclude that the Court's decision would have differed had there been a justification for distinguishing New Jersey waste from out-of-state waste. *See generally*, Maine v. Taylor, 477 U.S. 131 (1986) (upholding statute banning out-of-state bait fish which would have detrimental health effects).

27. *Philadelphia*, 437 U.S. at 627.

28. 437 U.S. at 626-27.

29. 397 U.S. 137 (1969). The basis of the balancing test in *Pike*, a case which invalidated an Arizona order requiring Arizona-grown cantaloupe to be packaged in-state, is as follows:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id.

30. Philadelphia v. New Jersey, 437 U.S. 617 (1978).

31. Hackensack Meadowlands Dev. Comm'n v. Municipal Sanitary Landfill Auth., 348 A.2d 505, 516 (N.J. 1975), *vacated*, Philadelphia v. New Jersey, 437 U.S. 617 (1978).

the statute only as a device for economic protectionism, the New Jersey Supreme Court found legitimate the statutory purposes of promoting health, safety, and welfare. Consequently, the New Jersey Supreme Court determined that the statute's benefits substantially outweighed the burden on interstate commerce.[32] Relying on the historic concept of the states' police power[33] and quoting Supreme Court precedent, the New Jersey Supreme Court stated "[d]oubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death . . ."[34] The New Jersey Supreme Court cited several quarantine cases in which the Supreme Court upheld state statutes expressly prohibiting specific articles of commerce within state borders in the interest of public health and preservation of the environment.[35]

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32. *Id.* at 515-19.

The New Jersey Supreme Court determined the statute's purpose was supported by the legislature's findings that:

> the volume of solid and liquid waste continues to rapidly increase, that the treatment and disposal of these wastes continues to pose an even greater threat to the quality of the environment of New Jersey, that available and appropriate land fill sites within the State are being diminished, that the environment continues to be threatened by the treatment and disposal of waste which originated or was collected outside the State and that the public health, safety and welfare require that the treatment and disposal within this State of all wastes generated outside of the State be prohibited.

437 U.S. at 625 (quoting ch. 363).

33. Although the concept of the states' police power is not mentioned specifically in the Constitution, the concept has become imbued in caselaw. JOHN E. NOWAK, CONSTITUTIONAL LAW, § 8.2, at 263 (2d ed. 1986). In defining the extent of these powers, the United States Supreme Court has stated:

> In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people. But if the State, under the guise of exerting its police powers, should make such exclusion or prohibition applicable solely to articles, of that kind, that may be produced or manufactured in other States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States.

Guy v. Mayor of Baltimore, 100 U.S. 434, 443 (1880).

34. *Hackensack*, 348 A.2d 505, 512 (N.J. 1975) (quoting Bowman v. Chicago & Northwestern Ry., 125 U.S. 465, 489 (1888)); *see also* Clason v. Indiana, 306 U.S. 439 (1939) (upholding an Indiana statute that banned the transport of certain dead, large animals outside the state for disposal).

35. Items that typically endangered public health included disease-infested or virus-infested substances, diseased animals and decayed meat. *See Bowman*, 125 U.S. at 489. In *Bowman*, the Court determined that such items, because of their nature, were "not legitimate subjects of trade and commerce." *Id.* at 489; *see also* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 525 (1934).

In contrast, the Supreme Court in *Philadelphia* distinguished the cited quarantine cases,[36] contending the articles at issue in the quarantine cases presented a much greater danger to public health and safety than did the garbage in *Philadelphia*.[37] Specifically, the Court stated, "[t]hose [quarantine] laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin."[38] The Supreme Court also dismissed other statutory bases that the New Jersey Supreme Court emphasized in supporting the legislation, such as protection of the environment, preservation of natural resources,[39] and the detrimental impact of out-of-state waste disposal on the life span of existing New Jersey landfills.[40]

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36. Other quarantine cases include: Mintz v. Baldwin, 289 U.S. 346 (1933) (upholding a New York statute prohibiting importation of diseased cattle); Oregon Washington R. & Navigation Co. v. Washington, 270 U.S. 87 (1926) (stating in dicta that prohibiting the importation of plants likely to be insect-infested did not violate the Commerce Clause); Sligh v. Kirkwood, 237 U.S. 52 (1915) (upholding a Florida statute that criminalized interstate commerce of citrus fruits unfit for consumption); Asbell v. Kansas, 209 U.S. 251 (1908) (upholding a state statute that criminalized importation of uninspected cattle); Reid v. Colorado, 187 U.S. 137 (1902) (upholding a state statute that restricted importation of cattle); Copagnie Francaise v. Louisiana Board of Health, 186 U.S. 380 (1902) (upholding a state statute that prohibited foreigners from entering quarantined area); Smith v. St. Louis & S.W. R.R. Co., 181 U.S. 248 (1901) (upholding a Texas regulation that restricted importation of cattle); Rasmussen v. Idaho, 181 U.S. 198 (1901) (upholding a state statute that allowed restrictions on importation of diseased sheep); Missouri, K & T. Ry. v. Haber, 169 U.S. 613 (1898) (upholding a Kansas statute that granted injured persons standing to sue an importer of diseased cattle).

37. *Philadelphia*, 437 U.S. at 622. Justice Stewart, for the Court, wrote:

> In *Bowman* and similar cases, the Court held simply that the articles' worth in interstate commerce was far outweighed by the dangers inhering in their very movement, states could prohibit their transportation across state lines. Hence, we reject the state court's suggestion that the banning of "valueless" out-of-state wastes by ch. 363 implicates no constitutional protection.

Id. Justice Rehnquist dissented. He acknowledged that landfills can cause severe health and safety problems, and that "in New Jersey, 'virtually all sanitary landfills can be expected to produce leachate, a noxious and highly polluted liquid which is seldom visible and frequently pollutes . . . ground and further surface waters." 437 U.S. at 630 (quoting App. 149). Rehnquist rejected the majority's decision, which distinguished waste from other items in the quarantine cases, and stated "[t]he Commerce Clause was not drawn with a view to having the validity of state laws turn on such pointless distinctions." 437 U.S. at 633 (Rehnquist, J., dissenting).

38. *Id.* at 629.

39. *Cf.* American Can Co. v. Oregon Liquor Control Comm'n, 517 P.2d 691 (1973) (holding that an Oregon statute that banned the sale of nonreturnable beverage containers did not violate the Commerce Clause); Proctor & Gamble Co. v. City of Chicago, 509 F.2d 69 (7th Cir. 1975) (upholding city ordinance that banned the use of phosphate detergents); Portland Pipeline Corp. v. Environmental Improvement Comm'n, 307 A.2d 1 (Me. 1973) (upholding a Maine statute that restricted the transfer of oil between vessels and shore facilities); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975) (upholding city plan restricting housing development based in part on the environmental welfare of the community).

40. *Philadelphia*, 437 U.S at 625-27. The New Jersey Supreme Court acknowledged the severity of the State's solid waste problem by referring to three surveys regarding the volume and origin of solid waste disposed of in landfills located within the Hackensack Meadowlands District. A 1968 survey, mandated by N.J.S.A. § 13: 17-10(a), found that approximately 30,000

Like New Jersey, other states have strived to curtail the amount of out-of-state waste entering their borders. Many have drafted legislation to regulate out-of-state waste, which often results in extensive litigation.[41] As *Philadelphia* set the precedent, many states have experienced difficulty in enacting legislation that is permissible under the Commerce Clause. Although New Jersey legislation was struck down in *Philadelphia*, the decision has subsequently benefited New Jersey, since its own waste is often what other states are attempting to restrict.[42] *Philadelphia* is unquestionably the greatest obstacle to states wishing to regulate waste importation.

B. State Waste Regulation Delegated to a Regional or Local Level

1. Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources[43]

The Waste Import Restrictions of Michigan's Solid Waste Management Act (MSWMA), legislation that gave counties the authority to control waste disposal within their borders, were at issue in *Fort Gratiot*. In response to the Michigan legislation, which delegated landfill citing and planning to specific counties,[44] St. Clair County

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tons of solid waste were disposed of at landfills in the District each week. An estimated 4,000 tons of this waste originated outside of New Jersey. A 1971 survey showed an increase in the total amount of solid waste disposed of in the District to 42,000 tons per week, 5,000 tons originating out-of-state. The last survey, conducted in 1973, showed that 55,000 tons of waste were deposited weekly in the District, 10,000 tons of which originated out of state. *Hackensack*, 348 A.2d at 509-10.

41. City of Auburn v. Tri-State Rubbish, Inc., 630 A.2d 227 (Me. 1993), *In re* Long-Term Out-of-State Waste Disposal Agreement, 568 A.2d 547 (1990), and Borough of Glassboro v. Gloucester County Board, 495 A.2d 49 (1985).

42. Justice Stewart, writing for the Court, foretold the future in writing:

> Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.

Philadelphia, 437 U.S. at 629.

43. 112 S. Ct. 2019 (1992).

44. The Michigan Solid Waste Management Act read:

> A person shall not accept for disposal solid waste . . . that is not generated in the county in which the disposal area is located unless the acceptance of solid waste . . . that is not generated in the county is explicitly authorized in the approved county solid waste management plan.

MICH. COMP. LAWS ANN. § 299.413a (Supp. 1991).

> In order for a disposal area to serve the disposal needs of another county, state, or country, the service . . . must be explicitly authorized in the approved solid waste management plan of the receiving county.

MICH. COMP. LAWS ANN. § 299.430(2) (Supp. 1991).

organized the St. Clair County Solid Waste Planning Committee (the Committee). The *Fort Gratiot* petitioner operated a private solid waste landfill within the county and applied to the Committee for authorization to accept 1750 tons of out-of-state solid waste in addition to local waste. The Committee denied the application based on a county policy that banned all non-county waste, prompting Petitioner Kettlewell to seek a declaratory judgment in federal district court. Kettlewell claimed that the Michigan legislation and the county's application of the statute violated the Commerce Clause.[45]

Michigan maintained that the legislation was a reasonable health and safety regulation designed to conserve limited landfill capacity rather than an act of "economic protectionism."[46] Michigan and St. Clair County further contended that the legislation and the county policy did not discriminate against interstate commerce because in-state waste and out-of-state waste were equally regulated.[47]

The district court perused the Michigan legislation to determine whether it constituted a protectionist measure subject to the elevated scrutiny analysis used by the *Philadelphia* Court or whether the legislation was actually directed at legitimate local concerns with only incidental effects on interstate commerce subject to the less stringent *Pike* balancing test.[48] The district court highlighted *Maine v. Taylor*,[49] in which the Supreme Court applied an elevated scrutiny analysis to uphold the constitutionality of facially discriminatory legislation.[50] However, the court ultimately determined that elevated scrutiny was unnecessary because the Michigan legislation did not constitute a facially discriminatory ban on out-of-state waste, but evenhandedly applied its goal of prolonging the useful lives of county landfills. Accordingly, the district court chose to apply the *Pike* balancing test.[51] The court noted the statute's purpose was legitimate: "to protect the

45. Bill Kettlewell Excavating, Inc. v. Michigan Dep't of Natural Resources, 732 F. Supp. 761, 762 (E.D. Mich. 1990), *aff'd*, 931 F.2d 413 (6th Cir. 1991), *rev'd sub nom.*, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992).

46. *Fort Gratiot*, 112 S. Ct. at 2026.

47. *Id.* at 2024.

48. *Kettlewell*, 732 F. Supp. at 763.

49. 477 U.S. 131 (1986). Maine v. Taylor upheld a state law that banned importation of certain species of live baitfish into Maine. The *Maine* Court determined there was no less discriminatory alternative that would protect the state's ecology from potentially diseased non-native baitfish as effectively as the state's law. The Supreme Court applied an elevated scrutiny analysis in concluding that there was a legitimate purpose for the ban, and no less discriminatory alternative to the ban existed. Interestingly, the *Maine* Court relied on precedent that held it was unnecessary for states to prove or disprove the feasibility of a less discriminatory alternative to meet legislative objectives and survive elevated scrutiny. *Id.* at 147.

50. Bill Kettlewell Excavating, Inc. v. Michigan Dep't of Natural Resources, 732 F. Supp. 761, 764-65 (E.D. Mich. 1990), *aff'd*, 931 F.2d 413 (6th Cir. 1991), *rev'd sub nom.*, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992).

51. *Id.* at 765-66.

public health and the environment; to provide for the regulation and management of solid wastes; to prescribe the powers and duties of certain state and local agencies and officials; to prescribe penalties; to make an appropriation; and to repeal certain acts and parts of acts."[52]

The district court distinguished its case from *Philadelphia*, stating "[u]nlike the New Jersey law, the MSWMA does not place the authority to issue a blanket preclusion against the importation of all out-of-state waste into one state official's hands."[53] Under the Michigan statute, each county had the authority to accept or deny waste imported from outside sources, even from other counties in Michigan.[54] Through careful illustration of the differences between the case before it and *Philadelphia*, the district court avoided any direct reference to the quarantine exception unsuccessfully relied on by New Jersey in *Philadelphia*.[55]

Citing the factually similar case of *Evergreen Waste Systems, Inc. v. Metropolitan Service District*,[56] the district court determined that St. Clair County's policy treated most in-state waste identically to waste originating outside the state, because both were precluded from entering the county. As did the *Evergreen* court, the district court determined that alternate landfills for the prohibited waste existed within the state, presenting a minimal burden on interstate commerce.[57] The Sixth Circuit affirmed the district court, finding "no error in the district court's ultimate conclusion that the 'MSWMA imposes only incidental effects upon interstate commerce, and may therefore be upheld' unless clearly excessive as compared to local benefits under *Pike*."[58]

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52. *Id.* at 765 (quoting 1978 Mich. Pub. Act No. 641).

53. *Id.* at 764.

54. *Id.* at 762.

55. Bill Kettlewell Excavating, Inc. v. Michigan Dep't of Natural Resources, 732 F. Supp. 761, 764 (E.D. Mich. 1990), *aff'd*, 931 F.2d 413 (6th Cir. 1991), *rev'd sub nom.*, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992).

56. 820 F.2d 1482 (9th Cir. 1987). *Evergreen* upheld a local ordinance that barred all waste importation to a metropolitan planning area's landfill on the premise that out-of-state waste was treated the same as most in-state waste. The *Kettlewell* plaintiff argued the *Evergreen* decision bore no relation to *Kettlewell* since *Evergreen* involved a government-controlled landfill. The plaintiff maintained the government's involvement as a market participant precluded any Commerce Clause violation. However, the plaintiff failed to acknowledge that the Ninth Circuit Court of Appeals strongly affirmed the district court opinion in *Evergreen*, which held that the regulation applied evenhandedly and did not unduly burden interstate commerce for the benefit of the local community. The *Kettlewell* district court expressly noted that the Ninth Circuit Court of Appeals affirmed *Evergreen* without addressing the market participant theory or its application to the case. *Kettlewell*, 732 F. Supp. at 765-66 n.2.

57. 732 F. Supp. at 765-66. It is important to note that the Sixth Circuit acknowledged its holding might have been different if all Michigan counties used the MSWMA to ban out-of-state waste. *Kettlewell*, 931 F.2d 413 (6th Cir. 1991), *rev'd sub nom.*, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992).

58. *Kettlewell*, 931 F.2d at 417-18.

Despite the persuasive analysis of the lower courts, the Supreme Court reversed the decision. Relying heavily upon *Philadelphia*, it struck down the Michigan legislation and held the state's grant of authority to regional waste planning districts unconstitutional. Because the Michigan legislation specifically curtailed out-of-state waste importation, the Court maintained that *Philadelphia* provided the proper framework for assessing its constitutionality.[59] Citing precedent,[60] the Court determined that the statute's ban on out-of-district waste as well as out-of-state waste had no bearing on statutory legitimacy, even though the Michigan legislation, unlike the cited precedent,[61] did not constitute an outright ban on out-of-state commerce. In declaring the legislation unconstitutional, the Court was unconcerned that most Michigan counties did not use the statute to effectively ban out-of-state waste, stating this "merely reduced the scope of the discrimination."[62]

The Supreme Court failed to recognize conservation of landfill capacity and its effect on public health and welfare as a legitimate purpose, despite the foundation of *Sporhase v. Nebraska*.[63] Interestingly, the *Fort Gratiot* Court acknowledged the *Sporhase* Court's recognition of a state's right to "conserve and preserve ground water for its own citizens in times of severe shortage."[64] However, in determining that the Michigan legislation discriminated against interstate commerce, the *Fort Gratiot* Court dismissed any correlation, stating that Michigan had not proved that its health and safety concerns

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59. Fort Gratiot Sanitary Landfill, Inc., v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019, 2023-24 (1992).

60. The Court cited Brimmer v. Rebman, 138 U.S. 78 (1891) (striking down Virginia legislation imposing specific inspection fees on meat from animals slaughtered over 100 miles from the place of sale) and Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (striking down a city ordinance that required all milk sold in Madison to be pasteurized within a five mile radius of the central square of the city). 112 S. Ct. at 2019, 2025.

61. For example, the Madison ordinance at issue in *Dean Milk* prohibited the sale or possession of milk with intent to sell if the milk originated outside the city. 340 U.S. at 350, n.1. The Court did not view the ordinance as an exercise of police power undertaken to protect citizens from contaminated product. *See id.* at 354-55. If that was the intent of the ordinance, the Court noted that a legitimate alternative existed that would allow the city to inspect milk, and charge "the actual and reasonable cost of inspection to the importing producers and processors." *Id.*

62. 112 S. Ct. at 2025.

63. 458 U.S. 941 (1982). At issue in *Sporhase* was Nebraska legislation conditioning water distribution to neighboring states on the Director of Water Resources' finding: (1) withdrawal of the ground water was reasonable; (2) withdrawal was not contrary to the conservation and use of ground water; and (3) withdrawal was not detrimental to public welfare. Condition (4), which required the adjacent state to grant reciprocal rights to Nebraska for water withdrawal and use in Nebraska, was deemed unconstitutional. *Id.* at 957-58.

64. 112 S. Ct. at 2026 (referring to *Sporhase*).

could not be accomplished by any less discriminatory means.[65] The Court suggested a less discriminatory alternative, that Michigan limit the amount of waste accepted annually by landfill operations.[66]

Fort Gratiot reflects the Supreme Court's conservatism toward waste regulation. The Michigan legislation did not specifically ban out-of-state waste, but granted the county authority to regulate out-of-state and out-of-county waste. The Supreme Court's reversal of the forceful district and appellate court decisions reflects the Court's expansive interpretation of *Philadelphia,* which the lower federal courts have been compelled to follow.[67]

2. Diamond Waste, Inc. v. Monroe County[68]

Diamond Waste is factually similar to *Fort Gratiot* because it addressed a state statute that granted local authority to make landfill policy. *Diamond Waste* involved a municipality that contracted with a

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65. *Id.* at 2027. Justice Rehnquist dissented in this case. *Id.* at 2028 (joined by Blackmun, J.). He recognized the dangers associated with waste disposal, the problem of limited landfill capacity, and the need for states to address the waste disposal issue. Unlike the majority, he interpreted Michigan's development of a statewide waste disposal planning process that included local government participation as indicative of the state's sincerity in addressing the waste issue. *Id.* at 2029. Citing *Sporhase,* he drew a parallel between the regulation of water as a scarce commodity and the regulation of landfill capacity. *Id.* at 2030. Justice Rehnquist wanted to remand the case to give the state a chance to prove the Waste Import Restrictions were directed at legitimate health and safety concerns. *Id.* at 2028.

66. 112 S. Ct. at 2027 (citing Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978)).

67. In *In re* Southeast Arkansas Landfill Inc. v. Arkansas Dep't of Pollution, 981 F.2d 372 (8th Cir. 1992), the Eighth Circuit Court of Appeals held unconstitutional Arkansas legislation restricting the amount of solid waste accepted by district landfills that was generated outside regional solid waste planning districts. The state argued the legislation did not facially discriminate against out-of-state waste since the restrictions applied evenhandedly to both out-of-district state waste and out-of-state waste. Relying on *Philadelphia* and *Fort Gratiot,* the court determined the legislation was aimed at economic protection. The court further noted that:

> *Fort Gratiot* compels a reversal in this case. Whether this is wise policy or not is not our business. If Congress believes it is unwise, if Congress wishes to authorize a regime under which each region, so to speak, takes care of its own waste, it can certainly do so. No such authority now exists, and we have no choice but to follow clear Supreme Court precedent.

Id. at 377.

The Eighth Circuit's adherence to *Philadelphia* was again demonstrated in Waste Systems Corp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1993). This time, the court struck down two local ordinances that required all compostable waste be delivered to a municipal composting facility to be processed in the following manner: one-third would be composted, one-third would be transformed into water vapor, and the remaining one-third would be sent to a landfill. The court maintained the ordinances were intended to isolate the compost plant "from competition with cheaper, out-of-state alternatives." *Id.* at 1388. Although sixty percent of the local waste stream was still eligible for disposal in interstate commerce the court quoted *Fort Gratiot,* stating this "merely reduce[s] the scope of the discrimination . . ." *Id.* at 1387 (quoting *Fort Gratiot,* 112 S. Ct. at 2025).

68. 939 F.2d 941 (11th Cir. 1991), *aff'g in part, Diamond Waste,* 731 F. Supp. 505 (M.D. Ga. 1990).

private entity, Diamond Waste, to operate a landfill.[69] The contract stipulated that Diamond Waste would dispose of residential waste from the City of Forsyth, in Monroe County, at no cost. However, Diamond Waste would charge for disposal of county garbage originating outside the city.[70] In addition, the contract expressly authorized Diamond Waste to receive waste from intrastate and interstate customers and to charge based on tonnage.[71] Because the landfill had previously accepted only in-city and in-county waste when jointly run by Monroe County and the Town of Forsyth,[72] the county objected when Diamond Waste's intent to operate the landfill on a regional basis came to light.[73] The Monroe County Commission unanimously banned the landfill.[74]

The Eleventh Circuit Court of Appeals held the resolution was not per se invalid because it did not facially discriminate against out-of-state commerce.[75] However, the court determined that the resolution's application was unconstitutional due to its substantial impact on interstate commerce[76] because it prohibited any out-of-county waste from being transported to the landfill. Although the Eleventh Circuit acknowledged that Monroe County had a valid purpose in limiting the amount of waste entering its landfill, the court maintained that other, less discriminatory alternatives were available.[77] Therefore, the court determined that the county resolution as applied did not survive the *Pike* balancing test.[78] However, the Eleventh Circuit recognized that the county's interest in regulating the landfill

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69. The landfill was located in an unincorporated area of Monroe County, Georgia. 939 F.2d at 942.

70. *Id.* at 943.

71. 731 F. Supp. at 506.

72. Under the previous arrangement, the city paid one-third of the operating costs and the county paid two-thirds. 939 F.2d at 942.

73. In order to contract for waste disposal, Georgia law required permission from the governing body of the county in which the dump was located. *See* GA. CODE ANN. § 36-1-16 (Michie 1987 & Supp. 1991).

74. *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941, 943 (11th Cir. 1991). The following motion was unanimously passed by the Monroe County Commission on October 25, 1989: "the Board of Commissioners resolve [sic] to prevent the creation of this Regional Landfill, by legal action if necessary, so that we will prevent garbage, trash, or waste of any kind from being transported into Monroe County from other counties and locations." *Id.*

75. *Id.* at 944.

76. In the short time that Diamond Waste had assumed control over the landfill, it received inquiries concerning the importation of 180 tons of waste daily from outside of Georgia. *Id.* at 944.

77. The Eleventh Circuit cited three alternatives that the county could have utilized to meet its objective of preserving landfill space: (1) the county could have placed reasonable daily tonnage limits on waste imports on a first come, first serve basis; (2) the county could have auctioned permits for dumping fixed amounts of imported waste at the landfill; and (3) the county could have implemented a lottery for out-of-county entities to dispose of waste at the landfill. *Id.* at 945.

78. *Id.* at 944-45.

was to protect public health and welfare. Because of this legitimate interest, the court upheld the constitutionality of the Georgia law under which the resolution was passed.[79]

The Eleventh Circuit explicitly distinguished *Philadelphia* in its decision.[80] Unlike the Supreme Court in *Philadelphia*, which held the New Jersey statute facially discriminatory, the Eleventh Circuit refused to classify the Monroe resolution as "per se" invalid since it did not constitute sheer economic protectionism. Although the Eleventh Circuit's analysis can be contrasted with that of the district court, which relied heavily on *Philadelphia*, both courts achieved the same outcome. The district court, via *Philadelphia*, found the statute facially discriminatory,[81] while the Eleventh Circuit found the statute was discriminatorily applied.[82]

Although *Diamond Waste* did not significantly expand *Philadelphia*, it reflects the impact of *Philadelphia* at the county level. The Eleventh Circuit was able to distinguish the county resolution from the Georgia legislation that delegated waste regulation authority to the county. Looking beyond the state legislation, the court assessed the potential impact of the county resolution on future waste activities and determined it posed a significant, potential burden to interstate commerce under the *Pike* balancing test.

C. *Regulation in Accordance With State Police Power and Differential Tipping Fees:*

1. National Solid Wastes Management Ass'n v. Voinovich[83]

In an effort to address the problems of solid waste disposal, Ohio enacted legislation that provided for the imposition of two separate fees on waste disposed within the state. The first statutory provision authorized a state fee on the disposal of solid waste to ensure proper cleanup of sites where hazardous waste had been stored or improperly disposed of, including solid waste facilities.[84] The fee

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79. *Diamond Waste, Inc. v. Monroe County*, 939 F.2d 941, 946 (11th Cir. 1991). Thus, Georgia counties can still require permit applications from individuals wanting to import hazardous waste.

80. *Id.* at 944.

81. 731 F. Supp. at 508-09.

82. 939 F.2d at 946.

83. 763 F. Supp. 244 (S.D. Ohio 1991), *rev'd*, 959 F.2d 590 (6th Cir. 1992).

84. The authorized fee provided for:

> 1. . . . [P]aying the state's long-term operation costs or matching share for actions taken under [CERCLA] . . .
>
> 2. [P]aying the costs of measures for proper cleanup of sites where polychlorinated biphenyls [PCB's] and substances, equipment, and devices containing or contaminated with [PCB's] . . . have been stored or disposed of;

was assessed on a tiered scale: $.70 per ton for disposal of waste originating in-county or in-district, $1.20 for waste generated in-state but out-of-district, and $1.70 for waste generated out-of-state.[85] The second statutory provision gave solid waste management districts discretion to impose a fee on solid waste to pay the costs of inspecting waste prior to disposal. Again, the fees were assessed on a tiered scale that distinguished between district, in-state/out-of-district, and out-of-state waste.[86] All funds generated from tipping fees on out-of-state waste were designated for an inspection program directed at waste imports.[87]

The National Solid Wastes Management Association (NSWMA) challenged the constitutionality of the two tipping fees, claiming the fees discriminated against out-of-state waste by imposing fees on out-of-state waste that were forty-two to three hundred percent higher than those imposed on in-state waste.[88] In response, the State cited *Pike* and *Maine v. Taylor* to illustrate that the tiered tax structure was a valid exercise of its police power intended to preserve the State's natural resources and environment.[89]

The district court determined the legislation was unconstitutional, stating "[t]he Court does not engage in this type of balancing test [*Pike*] if the legislation in question does not apply even-handedly [sic] to both intrastate and interstate commerce, unless the State offers a compelling reason for the disparate treatment."[90] Citing *Maine v. Taylor,* the district court determined that the State had no

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3. [P]aying the costs of conducting surveys or investigations of solid waste facilities or other locations where it is believed that significant quantities of hazardous waste were disposed of and for conducting enforcement actions arising from the findings of such surveys or investigations;

4. [A]nd for paying the costs of acquiring and cleaning up, or providing financial assistance for cleaning up, any hazardous waste facility or solid waste facility containing significant quantities of hazardous wastes, that constitutes an imminent and substantial threat to public health or safety or the environment.

OHIO REV. CODE ANN. § 3734.57(A) (Anderson 1988 & Supp. 1990).

85. *Id.*

86. The Ohio legislation authorized districts to charge fees on 1) in-district waste, 2) out-of-district but in-state waste, and 3) out-of-state waste. Fees levied against in-district waste were to equal one-half of the fees levied against in-state waste. Out-of-state waste was subject to a fee equal to the amount levied against in-district waste plus the amount levied against in-state waste. *See* OHIO REV. CODE ANN. § 3734.57(B)(1)-(3) (Anderson 1988 & Supp. 1990).

87. OHIO REV. CODE ANN. § 3734.57(E)(6) (Anderson 1988 & Supp. 1990).

88. 763 F. Supp. 244, 249 (S.D. Ohio 1991) *rev'd,* 959 F.2d 590 (6th Cir. 1992).

89. *Id.* at 260. Ohio's concern about solid waste was well-founded, as reflected by a 1988 Ohio EPA study: twenty-one of Ohio's eighty-eight counties had no solid waste disposal facilities. While forty-one counties had landfills with five years or less of remaining capacity, the combined total reflects that sixty-two of Ohio's eighty-eight counties had "insufficient solid waste disposal capacity." Brief of Appellant at 6-7, National Solid Wastes Management Ass'n v. Voinovich, (No. 91-3466) (citing EPA Annual Report, July 1988; R.24, Appendix 232-34).

90. 763 F. Supp. at 259.

"compelling" reason for enacting the legislation.[91] In holding Ohio's tiered tax structure unconstitutional, the court relied heavily upon *Philadelphia*, noting that a state could not discriminate against waste solely on the basis of its origin.[92]

The State maintained that higher costs associated with inspecting out-of-state waste necessitated the higher fees.[93] The State emphasized three crucial justifications for the tax: (1) the rapidity at which the volume of out-of-state waste was being transported into Ohio; (2) specific regulatory problems created by foreign waste since it, unlike waste generated in-state, could not be inspected at the point of origin by Ohio inspectors; and (3) the increased threat of hazardous waste materials entering Ohio.[94] However, the district court dismissed the State's rationale for the tax by stressing that a state could not give its citizens a preferred right to natural resources located within its borders.[95] The court interpreted Ohio's tipping tax structure as a revenue-raising provision[96] targeted at discouraging waste importation into Ohio.[97] The court emphasized that out-of-state waste was taxed at three times the rate of in-district waste, but downplayed the fact that Ohio waste originating out-of-district was taxed at a rate twice that of in-district waste.

Interestingly, the court did acknowledge the inherent tension between the Commerce Clause's free trade principle and a state's interest in exercising its taxing power:

> [T]he delicate balancing of the national interest in free and open trade and a State's interest in exercising its taxing powers requires a case-by-case analysis and such analysis has left much room for

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91. *Id.* at 261-62 n.11. Apparently, the court was not persuaded by evidence showing that over two billion pounds of out-of-state municipal solid waste was disposed of in Ohio, constituting eighteen percent of the total for 1988. *Id.* at 262.

As the State noted in its brief, *Maine v. Taylor* actually held: "once a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by nondiscriminatory means." 477 U.S. 131, 138 (1986) (quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979)). The *Maine* Court utilized the above analysis rather than focusing on the compelling state interest. *Id.*

92. *Voinovich*, 763 F. Supp. at 261.

93. *National Solid Wastes Management Ass'n v. Voinovich*, 763 F. Supp. 244, 263 (S.D. Ohio 1991) *rev'd*, 959 F.2d 590 (6th Cir. 1992).

94. *Id.* at 262. Inconsistent data concerning waste importation is a recognized problem; a lot of waste falls through regulatory cracks. Although the Ohio EPA's records reflected that the state received more than 500,000 tons of trash from New Jersey in 1990, New Jersey's records reveal that 114,000 tons were transported to Ohio. Kristin Young, *Ind., N.J. Governors OK Trash Import Curbs*, WASTE TECH NEWS, Sept. 23, 1991, at 1, 2.

95. *Id.* at 262-63 (citing Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978), Philadelphia v. West Virginia, 262 U.S. 553 (1923), and West v. Kansas Natural Gas Co., 221 U.S. 229 (1911)).

96. *Id.* at 264.

97. *Id.* at 265.

> controversy and confusion and little in the way of precise guidelines to the States in the exercise of their indispensable power of taxation.[98]

The district court found the tiered tipping structure unconstitutional, but acknowledged the legitimacy of imposing higher taxes on out-of-state entities to cover "administrative costs," including costs for inspecting out-of-state waste that posed different risks than in-state waste, provided the tax reflected the activity's actual cost.[99]

Although the district court's decision strongly curtailed Ohio's ability to regulate the stream of imported waste, Judge George C. Smith issued a stay of the decision on May 14, 1991:

> Recognizing the tremendous concerns of the Governor of the state of Ohio and the General Assembly relating to disposal of solid waste and its impact upon Ohio from an environmental standpoint, this Court finds that there could be irreparable injury to the public if there is a significant time gap in the enforcement and control of solid waste disposal.[100]

On appeal, the Sixth Circuit Court of Appeals reversed the summary judgment and remanded the case to give Ohio an opportunity to justify the higher fee by proving that out-of-state waste contained a higher percentage of hazardous waste.[101]

The case was resolved through a settlement agreement whereby Ohio agreed to revise the tiered tax structure stipulated in Ohio Revised Code section 3734.57.[102] The new legislation will protect out-of-state solid waste from higher disposal fees than those imposed upon in-state waste.[103] Introduction of the legislation resulted in dismissal

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98. *National Solid Wastes Management Ass'n v. Voinovich*, 763 F. Supp. 244, 259 (S.D. Ohio 1991) (quoting Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 403 (1984)) *rev'd*, 959 F.2d 590 (6th Cir. 1992).

99. *Id.* at 263. The court determined the State had not adequately supported its claim that out-of-state waste inspection was more costly than in-state waste inspection. The court also specified that inspection costs must be reasonable and accurately reflect the actual cost for such actions. *Id.* (citing Hale v. Bimco Trading, Inc., 306 U.S. 375 (1939) (holding a Florida statute that imposed an inspection fee that was sixty percent higher than actual cost on out-of-state cement was unconstitutional)).

100. Order of the District Court, National Solid Wastes Mgmt Ass'n v. Voinovich (No. C2-89-085). The court specified that revenue accumulated in excess of the in-state rate will be held in escrow until the case is resolved. Settlement Agreement, National Solid Wastes Mgmt Ass'n v. Voinovich, 959 F.2d 590 (S.D. Ohio) (No. C-2-89-0085) (March 29, 1993) (hereinafter *Settlement Agreement*).

101. National Solid Wastes Mgmt Ass'n v. Voinovich, 959 F.2d 590 (6th Cir. 1992).

102. Settlement Agreement, *supra* note 100 at 2.

103. *Id.*

of the lawsuit.[104] Ohio retained all past fees held in escrow in accordance with the settlement agreement.[105]

National Solid Wastes Management Ass'n v. Voinovich demonstrates the difficulty of enacting legislation that economically discriminates against out-of-state waste, even if in-state waste originating out-of-district is also affected in a disparate manner. The settlement agreement reflects both *Philadelphia* and *Fort Gratiot* by requiring that Ohio revise its tiered tipping structure to avoid discrimination against out-of-state waste. The Supreme Court may ultimately determine the permissible bounds for a differential solid waste disposal fee structure. In September 1993, the Supreme Court agreed to review Oregon legislation that established a differential tax structure for in-state and out-of-state waste.[106]

2. Government Suppliers Consolidating Services v. Bayh[107]

The Indiana legislation at issue in *Government Suppliers I* parallels the contested Ohio legislation in *National Solid Wastes Management Association v. Voinovich.* The Indiana legislation in *Government Suppliers I* included a tipping fee provision,[108] health officer

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104. *Id.* at 2-3. Governor Voinovich signed the legislation on July 30, 1993, as directed by the Settlement Agreement. Telephone Interview with Brian Zima, Assistant Attorney General for the State of Ohio (Aug. 9, 1993).

105. *Settlement Agreement, supra* note 100 at 2-3.

106. Oregon Waste Systems, Inc. v. Oregon Dep't of Envtl. Quality, 114 S. Ct. 436 (1993). Previously, the Oregon Supreme Court upheld the differential tax, claiming that the surcharge constituted a "compensatory fee" for specific costs incurred in regulating the out-of-state waste. Gilliam County v. Oregon Dep't of Envtl. Quality, 849 P.2d 500 (Or.), *cert. granted,* Oregon Waste Systems, Inc. v. Oregon Dep't of Envtl. Quality, 114 S. Ct. 436 (1993). Interestingly, the Oregon Supreme Court did not address the petitioners' claim that the set fee was disproportionate to costs incurred by the state in regulating the out-of-state waste, stating "those are factual inquiries" outside the court's scope of review. *Id.* at 509.

107. 753 F. Supp. 739 (S.D. Ind. 1990) (*Government Suppliers I*). The plaintiffs in this case were waste brokers who were actively involved in connecting East Coast trash collectors with Midwestern landfill operations that were significantly less costly than Eastern landfills. Government Suppliers estimated that sixty percent of its business involved disposal at Indiana landfills. Jack Castenova, another plaintiff, indicated that fifty percent of his business involved disposal at Indiana landfills in 1989. 753 F. Supp. at 748-49.

108. The provision read:

> (a) Beginning January 1, 1991, a fee is imposed on the disposal or incineration of solid waste in a final disposal facility in Indiana. Except as provided in section 6 [IC 13-9.5-5-6] of this chapter, the amount of the fee is as follows:
>
> (1) For solid waste generated in Indiana, fifty cents ($0.50) a ton.
>
> (2) For solid waste generated outside Indiana, the greater of the following:
>
> (A) The cost per ton of disposing of solid waste, including tipping fees and state and local government fees, in the final disposal facility that is closest to the area in which the solid waste was generated, minus the fee actually charged for the disposal or incineration of the solid waste by the owner or operator of the final disposal facility in Indiana.
>
> (B) Fifty cents ($0.50).

IND. CODE ANN. § 13-9.5-5-1(a) (West Supp. 1990).

certification, and hauler certification[109] requirements. The tipping fee provision imposed a variable fee on out-of-state waste that correlated directly with the cost incurred if the waste had been disposed of near its generation point. This provision significantly increased costs for haulers who imported waste into Indiana for disposal, especially those from the East Coast. The average East Coast landfill charge was calculated at over $100 per ton as opposed to the average Indiana landfill charge of $12.00 per ton.[110] The court applied elevated scrutiny and determined the fee constituted a greater burden on out-of-state trash than on in-state trash.[111] The court recognized protection of state citizens' health and welfare as legitimate local concerns,[112] but determined these were not the motivating forces behind the statute. Instead, the court identified "economic isolationism" as the true statutory purpose.[113] Citing *Philadelphia*, the court determined economic protectionism was not a legitimate state interest. For support, the court cited several public statements made by the Governor and members of his administration.[114] The court determined that implementing the statute was a political ploy reflecting popular sentiment against Indiana becoming a dumping ground for East Coast waste.[115]

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109. Before allowing a vehicle to dispose of waste in a final disposal facility, the statute in essence required certification by the vehicle operator and documentation from a government officer where the waste originated, the Indiana county or if outside Indiana the state in which the largest amount of the waste was generated, that the waste was not hazardous or infectious. *See* IND. CODE ANN. § 13-7-22-2.7(c)(d) (West Supp. 1991).

110. 753 F. Supp. at 766 n.33.

111. *Id.* at 762-66.

112. Government Suppliers Consolidating Serv. v. Bayh, 753 F. Supp. 739, 767 (S.D. Ind. 1990) (citing Maine v. Taylor, 477 U.S. at 151, Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 670 (1981) (regulating highway safety), and Dean Milk Co., 340 U.S. at 353 (regulating milk products)).

113. 753 F. Supp. at 767.

114. Governor Bayh, in his 1990 "State of the State" address, specifically addressed the waste issue:

> But what is objectionable, what is offensive, and what must be stopped is the tidal wave of out-of-state trash that threatens to turn Indiana into a dumping ground for the nation. It's coming by the truckload, it's coming by train, it's using up scarce disposal capacity, and it threatens our ability to manage our own needs. To show you just how bad things have become, I have with me a piece of out-of-state garbage which blew off a truck headed for a Hoosier landfill. On it is printed "State of New York." Well, with all due respect to the State of New York, if it's their property, they should keep it...
>
> We must end the financial incentive that literally makes it pay for out-of-staters to dump in Indiana. If it costs $70 for another state to dispose of its waste at home, it should not cost them $11 here.

753 F. Supp. at 746.

115. Kristin Young, *Ind., N.J. Governors OK Trash Import Curbs*, WASTE TECH NEWS, Sept. 23, 1991, at 1, 2. Indiana's concern is well-founded. Between January and September 1991, 160,000 tons of New Jersey waste were shipped to Indiana. *Id.* Only 1,000 of these tons were shipped with the proper permits. In 1990, only 61 tons of solid waste were shipped legally from New

The court acknowledged that the State proved the tipping statute was related to a legitimate public interest and served that legitimate interest.[116] Under the *Philadelphia* analysis, however, the court determined that nondiscriminatory alternatives were available to achieve this interest.[117] Therefore, the court found the tipping fee provision unconstitutional. It concluded that a universal standard tipping fee charged to both in-state and out-of-state haulers would serve the statute's purpose. However, the court emphasized that costs assessed for trash inspection to ensure compliance with state and federal laws could be passed along to the hauler through a tipping fee.[118]

The court also struck down the provision requiring a health officer's certification as a prerequisite to out-of-state solid waste disposal in Indiana. After determining that this provision facially discriminated against out-of-state waste, the court applied an elevated scrutiny test in assessing its constitutionality.[119] Since a nondiscriminatory alternative was available to serve the State's legitimate interest in protecting health and safety, i.e., applying the certification requirement to both in-state and out-of-state haulers, the court found the health officer certification provision violated the Commerce Clause.[120]

The third statutory requirement of hauler certification applied evenhandedly to both Indiana and out-of-state haulers. Therefore, the court determined it was appropriate to scrutinize the provision under the *Pike* balancing test rather than the elevated scrutiny invoked by the other statutory provisions.[121] In analyzing the hauler certification, the court determined that the State's health and safety interest was only minimally advanced by the hauler certification. Because the provision required that only the state generating the "largest part" of the shipment be identified, the State's objective was devoid of any meaning. The court expressed concern that the

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Jersey to Indiana. Consequently, the two states signed the Indiana/New Jersey Solid Waste Enforcement Plan on August 19, 1991. In accordance with the plan, New Jersey provides Indiana with notices of license revocations; the states exchange information concerning illegal dumping; Indiana shares information it has concerning shipment of improper wastes; Indiana works with New Jersey in implementing its new transfer station inspection law; Indiana is allowed to take part in New Jersey's border inspections; and the two states work to create a uniform training program for enforcement personnel from both states. *Id.*

116. The court acknowledged that placing the out-of-state tipping fees into a fund to cleanup hazardous sites in Indiana, and placing in-state tipping fees in the state solid waste management fund to promote recycling were legitimate statutory objectives. 753 F. Supp. at 769-70 (referring to §§ 13-9.5-5-1(b) and 13-9.5-5-2).

117. Government Suppliers Consolidating Serv. v. Bayh, 753 F. Supp. 739, 770 (S.D. Ind. 1990).

118. *Id.* at 774.

119. *Id.* at 773.

120. *Id.* at 774.

121. *Id.* at 775.

provision significantly impeded interstate commerce.[122] The court cited trial evidence showing that most trash entering Indiana originated on the East Coast and went to a recycling or transfer station before being loaded onto a truck for shipment to the Midwest.[123] Because transfer stations on the East Coast received waste from numerous states, waste entering Indiana was only traceable to the transfer station, making it impossible to identify the state of origination. Because the haulers were held responsible for certification under penalty of Indiana's perjury law, the court determined the provision was unconstitutional.[124]

After all three of Indiana's statutory provisions were declared unconstitutional by the court, the Indiana legislature revised the statute. In *Government Suppliers Consolidating Services v. Bayh, (Government Suppliers II)*[125] the same waste brokers challenged the revised legislation, which consisted of a backhaul ban,[126] vehicle registration and stickering requirements,[127] disposal fees[128] and a surety bond requirement. Essentially, the revised legislation required trash trucks to display state registration stickers, allowed Indiana officials to inspect in-state and out-of-state trash transfer stations, and levied a fee on the disposal of out-of-state trash to cover the cost of implementing the statute.[129] On February 7, 1992, a judge for the Seventh Circuit Court of Appeals enjoined the State of Indiana from enforcing the revised legislation. The injunction was issued two days after a federal district court upheld the constitutionality of most of the

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122. Government Suppliers Consolidating Serv. v. Bayh, 753 F. Supp. 739, 777 (S.D. Ind. 1990).

123. *Id.*

124. *Id.* at 778.

125. 975 F.2d 1267 (7th Cir. 1992) (*Government Suppliers II*), *cert. denied*, 113 S. Ct. 977 (1993).

126. The backhaul ban provided that municipal waste collection and transportation vehicles were to be used exclusively to collect and transport specific types of waste. *See* IND. CODE § 13-7-13.1 (West 1991). Municipal waste collection and transportation vehicles were defined as any truck or railroad car used to transport municipal waste to a solid waste processing or disposal facility in Indiana. Such restrictions did not include vehicles used to transport waste from residences when owned by the persons living at the residence or other vehicles not used for commercial waste transportation. *See* IND. CODE § 13-7-31-3 (West 1991).

127. *See* IND. CODE § 13-7-31-8.2(d) (West Supp. 1992).

128. Vehicles weighing more than 9,000 pounds and carrying in-state waste for disposal or incineration were subject to a fifty cents per ton disposal fee. Vehicles weighing more than 9,000 pounds and carrying out-of-state waste were subject to a fifty cents per ton disposal fee plus any additional amount established by solid waste management board rules. All vehicles weighing less than 9,000 pounds were subject to a fifty cent per load fee. *See* IND. CODE § 13-9.5-5-1 (1992).

The statute required the solid waste management board to adopt rules imposing an additional fee on out-of-state waste in an amount necessary to offset costs attributed to the importation and presence of out-of-state waste. Revenue from the additional fee was to be deposited in a hazardous substances response trust fund, minus any amount needed to offset costs incurred by government entities. *See* IND. CODE § 13-9.5-5-1 (1992).

129. *Judge Grants Injunction on New State Trash Laws*, INDIANAPOLIS STAR, Feb. 8, 1992, at A1.

statutory provisions, specifically the backhaul ban, disposal fee, and registration and stickering requirements, but struck down the surety bond provision.[130]

Although the district court applied the *Pike* balancing test in assessing the backhaul ban's constitutionality, the Seventh Circuit instead determined an elevated scrutiny test was appropriate.[131] The appellate court maintained that the *Pike* test was not always applicable in assessing the constitutionality of facially nondiscriminatory legislation.[132] The court determined that although the statute was facially nondiscriminatory, it was unconstitutional due to its substantial impact on interstate commerce.[133] Indiana claimed that the backhaul ban was directed at several legitimate purposes, including protection of health and the State's commercial reputation. However, the court determined that Indiana neglected to provide substantial evidence of detrimental health effects associated with backhauling.[134] The court dismissed the State's commercial reputation justification, stating that an economic interest "is hardly deserving of the same deference that would be owed to significant health and safety concerns."[135] In holding the legislation unconstitutional, the court maintained that market pressure would limit the backhauling practice if economic reputation were deemed a legitimate state interest. The court also questioned the backhaul ban's effectiveness, observing that the ban would affect only transporters carrying waste within Indiana. Because the legislation had no impact on those who hauled waste exclusively outside of Indiana, the court determined that the legislation was not directed at protecting Indiana citizens, but at protecting the health and safety of out-of-state recipients of Indiana goods.[136]

The Seventh Circuit also found the registration and stickering requirements unconstitutional, because their primary function was to enforce the backhaul ban.[137] The State asserted an independent statutory purpose for the $100 registration fee, that the fee prevented deception and misrepresentation associated with past use of the transporting vehicle. Although the court acknowledged the validity

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130. 753 F. Supp. 739 (S.D. Ind. 1990).

131. *Government Suppliers II*, 975 F.2d 1267, 1279 (7th Cir. 1992) *cert. denied*, 113 S. Ct. 977 (1993).

132. *Id.* at 1278 (quoting Brimmer v. Rebman, 138 U.S. 78 (1891) (holding unconstitutional Virginia legislation that imposed a significant inspection cost upon fresh meat that originated outside a one hundred mile radius prior to sale).

133. *Id.* at 1278, 1281.

134. *Id.* at 1279, 1280 n.9. In its brief, Indiana conceded that the record before the court disclosed no confirmed cases of illnesses resulting from crosshauling food, garbage, or goods.

135. *Id.* at 1280.

136. *Government Suppliers II*, 975 F.2d 1267, 1280 (7th Cir. 1992) *cert. denied*, 113 S. Ct. 977 (1993).

137. *Id.* at 1281.

of such a purpose, it maintained that the legislation failed to achieve that purpose because it only addressed backhauling that involved out-of-state waste.[138] Thus, the potential impact on interstate waste haulers was substantial. The court also expressed concern that the registration fee might make dumping prohibitive for out-of-state carriers because the required fee for these one-time haulers equaled the fees paid by daily in-state haulers.[139] The court even likened the registration fee to a discriminatory tax.[140] In sum, the court found that the registration and stickering requirements merely diverted waste from Indiana, and were ineffective at promoting the State's health and safety objectives.[141]

The Seventh Circuit also found the tipping fees and surety bond unconstitutional.[142] The court expressed concern over the differential tax structure, which allowed the State to tax interstate commerce more heavily than in-state commerce when facilities supported by general state tax funds were utilized.[143] Indiana, adhering to the rationale of the district court in *Government Suppliers I*, claimed it was imposing fees on out-of-state trash in an amount 'necessary to offset' its administrative costs associated with the imported waste.[144] Although the appellate court agreed that "interstate commerce may constitutionally be made to pay its way,"[145] it determined the higher fee was not justified because the State failed to provide substantial evidence that out-of-state waste posed different risks and costs than Indiana waste.[146] Instead, the court determined the tax constituted little more than a user fee on out-of-state waste.

Although the State maintained that the surety bond's statutory purpose was to "facilitate the collection of fines and penalties from nonresidents," the appellate court determined the bond was not justified because Indiana neither produced evidence of the increased difficulty of collecting penalties from nonresidents over residents, nor

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138. *Id.*

139. *Id.* at 1281-82.

140. *See* American Trucking Ass'n, Inc. v. Scheiner, 483 U.S. 266 (1987) (concluding that a fee on out-of-state trucks five times as high as the fee for local trucks is plainly discriminatory).

141. *Government Suppliers II*, 975 F.2d at 1281-82.

142. *Id.* at 1285.

143. *Id.* at 1284.

144. *Government Suppliers II*, 975 F.2d 1267, 1283 (7th Cir. 1992) *cert. denied*, 113 S. Ct. 977 (1993).

145. *Id.* (quoting Maryland v. Louisiana, 451 U.S. 725, 754 (1981)). The Court in *Maryland* further stated, "[t]he State's right to tax interstate commerce is limited, however, and no state tax may be sustained unless the tax: (1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the State." *Maryland*, 451 U.S. at 754.

146. *Government Suppliers II*, 975 F.2d at 1285.

proved that less discriminatory alternatives were unavailable.[147] The court was concerned that the surety bond, like the registration fee, violated the Privileges and Immunities Clause by its differentiation between residents and nonresidents and would make waste disposal in Indiana financially prohibitive for the out-of-state hauler. The court concluded that "Indiana's statutes do not survive the elevated scrutiny given to legislation that unambiguously discriminates against interstate commerce. So weak is the rationale offered by Indiana, that even when the statutes are examined under the *Pike* test, the same result is reached."[148]

Government Suppliers I and *Government Suppliers II* again demonstrate the strength of the *Philadelphia* decision. After *Government Suppliers I*, Indiana revised its legislation to reflect the district court's interpretation of Commerce Clause applicability. Despite Indiana's creative attempts to regulate waste through the backhaul ban and stickering and registration requirements, the Seventh Circuit focused upon the economic impact of the state regulation in *Government Suppliers II*. The Supreme Court's denial of certiorari[149] indicates that a strong factual basis is crucial for any state argument to prevail based on protection of public health and safety.

II. STATE REGULATION OF HAZARDOUS WASTE

A. *Reciprocal Ban:* National Solid Wastes Management Ass'n & Chemical Waste Management v. Alabama Department Of Environmental Management[150]

The State of Alabama addressed hazardous waste importation by enacting the Holley Bill[151] in September 1989. The Bill relied on CERCLA's capacity assurance provision, which requires states to devise a twenty-year hazardous waste disposal plan, to justify its ban on out-of-state hazardous waste.[152] Imported hazardous waste was

147. *Id.*

148. *Id.*

149. *Bayh v. Government Suppliers Consolidating Servs., Inc.*, 113 S. Ct. 977 (1993).

150. 910 F.2d 713 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2800 (1991).

151. The Holley Bill stated that it was unlawful to treat or dispose of waste coming from states which had no hazardous waste facilities of their own, or from states who were not members of an interstate agreement for disposing hazardous wastes pursuant to CERCLA. The Bill directed that an explanatory list of the forbidden states be made public, and further provided that no facility in Alabama was permitted to contract with states other than Alabama to satisfy CERCLA requirements. *See* ALA. CODE § 22-30-11 (1990) as cited by Robert O. Jenkins, Note, *Constitutionally Mandated Southern Hospitality:* National Solid Wastes Management Association and Chemical Waste Management, Inc., v. Alabama Department of Environmental Management, 69 N.C. L. REV. 1001, 1004 n.20 (1991) [hereinafter Jenkins, *Southern Hospitality*].

152. CERCLA's capacity assurance provision stipulates that no remedial actions may be taken unless the state where the release occurred had a contract with the President of the

banned unless the importing state could demonstrate that it had the capacity to dispose of its own waste or had entered into an agreement with the State of Alabama.[153] Although the ban prevented hazardous waste importation from twenty-two states and the District of Columbia, the lower court noted that less than three-tenths of one percent of the hazardous waste disposed of in Alabama was affected by the Holley Bill.[154] Chemical Waste Management, owner and operator of the Emelle hazardous waste management facility,[155] and National Solid Wastes Management Association contested the constitutionality of the Alabama legislation.[156]

On appeal, the Eleventh Circuit Court of Appeals relied heavily on *Philadelphia*, holding that the Holley Bill violated the Commerce

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United States to assure the availability of in-state hazardous waste disposal facilities or out-of-state facilities in accordance with an interstate or regional agreement. The provision requires that there be adequate capacity for treatment and disposal of all hazardous wastes generated within the state during a twenty year period. *See* 42 U.S.C. § 9604(c)(9) (1992).

The federal government's objective in enacting CERCLA's capacity assurance requirements was to ensure that states adequately provide for their own hazardous and toxic waste disposal. 132 CONG. REC. S14895-02 (1986) [Superfund Amendment And Reauthorization Act—Conference Report]. Although Congress recognized that the politics involved in waste disposal often interfere with a state's fulfillment of its capacity requirements, Congress' objective was clear. *See* S. REP. NO. 11, 99th Cong., 1st Sess. 22, 23 (1985) (noting the conflict between the need for waste disposal sites and public sentiment that "[w]hile everyone wants hazardous waste managed safely, hardly anyone wants it managed near them"). CERCLA's capacity assurance requirements are designed to compel states to accept responsibility for their waste generation. OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. EPA, *Assurance of Hazardous Waste Capacity: Guidance to State Officials* 3 (1988).

153. As of January 1990, waste shipments from Alaska, Arizona, Delaware, the District of Columbia, Florida, Hawaii, Kansas, Maine, Mississippi, Missouri, Montana, New Hampshire, New Mexico, Oregon, Puerto Rico, South Dakota, the U.S. Virgin Islands, Vermont, Virginia, Washington, West Virginia, and Wyoming were affected by the ban. Thirteen states that might not have had sufficient capacity, and could have been banned from disposing wastes in Alabama included California, Connecticut, Georgia, Indiana, Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, Texas, Utah, and Wisconsin. 20 Env't Rep. (BNA) 1622 (Jan. 19, 1990).

154. National Solid Wastes Management Ass'n & Chem. Waste Management, Inc. v. Alabama Dep't of Envtl. Management, 729 F. Supp. 792, 800 (N.D. Ala.), *vacated*, 910 F.2d 713, 715 (11th Cir. 1990) (stating that before the contested legislation went into effect, eighty-five percent of the waste disposed of at the Emelle site originated out-of-state and came from forty-eight states), *cert. denied*, 111 S. Ct. 2800 (1991). Interestingly, a spokesman for ChemWaste understated the impact of the Holley Bill shortly after its passage, stating:

> I don't think in the long run that [the Holley Bill] will affect volumes at Emelle all that much, although that's very difficult to say with precision. . . . We're a very big operation. As a practical matter, only four states (of the 22 banned) will be affected. And the total (from all 22 states and the District of Columbia) is less than 100,000 tons a year, with the overwhelming amount coming from Florida, Mississippi, North Carolina, and Virginia.

Jenkins, *Southern Hospitality*, *supra* note 151, at 1026 (quoting Brief of Appellees at 34, *ChemWaste*, (No. 90-7047)).

155. The Emelle facility, located in Emelle, Alabama, is the United States' largest and Alabama's only commercial hazardous waste management facility. 910 F.2d at 715.

156. 729 F. Supp. 792 (N.D. Ala. 1990).

Clause because of the restrictions it placed on imported hazardous waste.[157] In doing so, it applied a strict scrutiny analysis.[158] The Eleventh Circuit rejected the State's claim that the statutory purpose was to ensure compliance with CERCLA's capacity assurance requirements, holding that: (1) the Holley Bill was not necessary for compliance with CERCLA's capacity assurance requirements, (2) the Holley Bill only addressed out-of-state waste and failed to recognize the importance of regulating in-state waste in its efforts to comply with CERCLA's capacity assurance requirements, and (3) the Holley Bill only banned hazardous waste from specific states, thereby discriminating on the basis of origin.[159]

According to the Eleventh Circuit, less discriminatory options were available to ensure future Alabama waste capacity. These options included creating new disposal capacity within Alabama, entering into agreements with other states that did have capacity, and contracting with private waste management facilities.[160] In suggesting that Alabama create new disposal capacity and contract with private waste management facilities, the court failed to address the Holley Bill's fundamental purpose—preservation of land, a finite natural resource from which future landfills will be created. The assumption that Alabama could enter into compacts with other states ignored that such compacts are undertaken voluntarily by participating states.[161]

The Eleventh Circuit acknowledged that *Philadelphia* concerned solid waste while the Alabama case involved hazardous waste; however, despite this significant difference, the court's deference to *Philadelphia* was clear. It noted that movement of hazardous waste was tightly regulated to ensure protection of public health and

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157. 910 F.2d 713, 725 (11th Cir. 1990) *cert. denied*, 111 S. Ct. 2800 (1991).

158. *Id.* at 720.

159. *Id.* It should be noted that Alabama's concern that other states might fail to comply with their capacity assurance requirements is legitimate. *See generally*, Jenkins, *Southern Hospitality, supra* note 151.

160. *Id.* (citing S. REP. NO. 11, 99th Cong., 1st Sess. 22 (1985); OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVTL. PROTECTION AGENCY, *Assurance Of Hazardous Waste Capacity: Guidance To State Officials* 3 (1988)) (hereinafter *Hazardous Waste Capacity*).

161. Waste disposal is an emotionally-charged issue, and most communities are not receptive to receiving waste originating outside of the community, let alone out-of-state. The EPA recognizes the public's hostility to out-of-state waste:

> [P]ublic opposition to the creation and permitting of facilities that manage wastes generated in other states is greater than opposition to facilities that manage wastes generated within the same state or locality. By requiring that generating states provide the assurances of access to capacity for their own wastes, Congress placed responsibility on the states most able to create and to permit additional capacity.

Hazardous Waste Capacity, supra note 160; *see also* Jonathan R. Stone, Supremacy & Commerce Clause Issues Regarding State Hazardous Waste Import Bans, 15 COLUM. J. ENVTL. L.1, 2-4 (1990) (reviewing historical controversy between North Carolina and South Carolina).

safety.[162] It further noted that to the extent such regulations protected public health and safety, "the dangers associated with hazardous waste movement do not outweigh the value of moving hazardous waste across state lines."[163] The court followed Eleventh Circuit precedent in classifying hazardous waste as an article of commerce,[164] and extended this precedent beyond the parameters of *Philadelphia*. The extension is significant. While all waste adversely affects the environment, hazardous waste is classified accordingly because of its lethal effect on human health and the environment.[165]

The Eleventh Circuit decision can be contrasted with that of the lower court.[166] While the Eleventh Circuit stressed the similarities to *Philadelphia*, the district court focused on the differences between the two cases. The district court noted that unlike the New Jersey statute at issue in *Philadelphia*, the Holley Bill did not preclude the importation of all solid waste.[167] The Alabama law only restricted the importation of hazardous waste from states that failed to comply with the federally-mandated capacity assurance requirements.[168] The district court acknowledged that Alabama enacted the statute to ensure Alabama's compliance with federal legislation. It maintained that the statute served a legitimate interest in protecting the environment and public health and safety.[169] Therefore, the district court applied the *Pike* balancing test, and held that the statute's "impact on interstate commerce is incidental and not excessive in relation to the local benefits."[170]

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162. National Solid Wastes Management Ass'n & Chem. Waste Management, Inc. v. Alabama Dep't of Envtl. Management, 910 F.2d 713, 719 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2800 (1991).

163. *Id.*

164. *See id.* (citing State of Alabama v. United States EPA, 871 F.2d 1548, 1555 n.3 (11th Cir. 1989) (relying heavily on *Philadelphia*); Hardage v. Atkins, 582 F.2d 1264, 1266 (10th Cir. 1978) (determining that industrial waste, as opposed to specific hazardous waste, fell under the constraints of the Commerce Clause)).

165. *See infra* parts III.A.1-2.

166. National Solid Wastes Management Ass'n & Chem. Waste Management, Inc. v. Alabama Dep't of Envtl. Management, 729 F. Supp. 792 (N.D. Ala.), *vacated*, 910 F.2d 713 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2800 (1991).

167. *Id.* at 804.

168. Alabama is not the only state where CERCLA's capacity assurance requirements have been an issue. New York filed suit against the EPA on December 16, 1991, for the agency's approval of several Northeastern states' hazardous waste capacity assurance plans which allegedly failed to provide adequately for hazardous waste management. At issue was a regional Capacity Assurance Plan signed by Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Vermont, Virginia, West Virginia, and the District of Columbia. 22 Env't Rep. (BNA) 2099 (Jan. 3, 1992).

169. 729 F. Supp. at 804.

170. *Id.*

The Supreme Court's denial of certiorari[171] left intact the Eleventh Circuit's extension of *Philadelphia* to hazardous waste importation. In addressing the tension between Alabama legislation designed to comply with federal environmental legislation and the Commerce Clause, the Eleventh Circuit adhered to the *Philadelphia* precedent, reflecting the significant impact of the Commerce Clause on hazardous waste regulation.

B. Differential Fee: Chemical Waste Management, Inc. v. Hunt[172]

In another effort to regulate hazardous waste, Alabama enacted legislation that placed several specific disposal restrictions on commercial facilities that disposed of over 100,000 tons of hazardous waste annually.[173] The statute included an annual cap on the amount of hazardous waste disposed at the facility[174] and a $25.60 per ton base fee on the facility operator for all hazardous wastes and substances disposed at the facility.[175] In addition, the statute imposed a $72 per ton tipping fee on all out-of-state waste.[176] Chemical Waste Management, the operator of the Emelle hazardous waste facility, challenged the constitutionality of the statute. The lower court held the cap provision and the base fee constitutional, but

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171. 111 S. Ct. 2800 (1991).

172. 112 S. Ct. 2009 (1990).

173. Actually, the legislation affected only the Emelle facility because that is the only site that met the statute's specifications. Alabama's concern over the Emelle site is well-founded. Hazardous waste leachate has already begun to permeate the Selma chalk at a currently incalculable rate. There is concern that the leachate might migrate laterally, eventually entering the Noxubee and Tombigbee Rivers. The Emelle facility is located within an earthquake risk zone. An 1886 earthquake caused a one-half foot movement of the ground surface in Sumter County. Evidence suggests that an earthquake could unseal chalk cracks, resulting in movement of leachate and hazardous waste. Hunt v. Chemical Waste Management, Inc., 584 So. 2d 1367, 1374-75 (Ala. 1991), *vacated*, 112 S. Ct 2009 (1992).

Between 1985 and 1989, the volume of hazardous waste disposed of at the Emelle site more than doubled, as reflected by the following figures of hazardous waste received by the facility:

1985..... 341,000 tons
1986..... 456,000 tons
1987..... 564,000 tons
1988..... 549,000 tons
1989..... 788,000 tons

Between eighty-five and ninety percent of the hazardous waste originated out-of-state. *Id.* at 1373.

174. ALA. CODE § 22-30B-2.3 (1990 & Supp. 1991) (repealed 1992). The cap was "in addition to any other ban or restrictions on disposal imposed by any regulatory authority." *See id.* The statute allowed the cap to be exceeded if the Governor deemed it necessary to ensure public health and safety or to ensure compliance with state or federal disposal capacity regulations. *See id.*

175. *Id.* § 22-30B-2(a).

176. *Id.* § 22-30B-2(b). The fee structures implemented by the Act resulted in Chemical Waste Management payments totaling $34 million. The fees resulted in an approximate fifty percent decline in waste disposal at the site. Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, 2014 n.4 (1992).

determined that the differential tipping fee was unconstitutional.[177] Subsequently, the Alabama Supreme Court found all three components of the legislation constitutional.[178]

Although the Alabama Supreme Court acknowledged that the $72 tipping fee was facially discriminatory, it determined the fee advanced a legitimate local purpose that could not be served by less discriminatory alternatives.[179] Citing *Maine v. Taylor*,[180] the court noted *Maine's* application of an elevated scrutiny analysis in upholding facially discriminatory legislation.[181] The court also listed examples of local purposes that could not be addressed by less discriminatory alternatives: (1) protecting Alabamians from toxic substances; (2) conserving Alabama's natural resources and environment; (3) providing compensatory revenue for costs for disposing out-of-state hazardous waste; (4) reducing the transport of waste, and consequently related health and safety risks on Alabama's highways.[182] Noting the finite capacity for hazardous waste storage, the court justified the tax on the premise that "Alabama is bearing a grossly disproportionate share of the burdens of hazardous waste disposal for the entire country," because eighty-five to ninety percent of the waste buried at the Emelle facility originated out-of-state.[183] The Alabama Supreme Court emphasized unique dangers accompanying hazardous waste, explicitly distinguishing it from the solid waste at issue in *Philadelphia*.[184] In referring to the Commerce Clause's quarantine exception, the Alabama Supreme Court found

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177. Hunt v. Chemical Waste Management, Inc., 584 So. 2d 1367, 1369-70 (Ala. 1991), *vacated*, 112 S. Ct. 2009 (1992).

178. *Id.* at 1390.

179. Hunt v. Chemical Waste Management, Inc., 584 So. 2d 1367, 1388-89 (Ala. 1991), *vacated*, 112 S. Ct. 2009 (1992).

180. 477 U.S. 131 (1986).

181. Hunt v. Chemical Waste Management, Inc., 584 So. 2d 1367, 1388 (Ala. 1991), *vacated* 112 S. Ct. 2009 (1992). *But see Hunt*, 112 S. Ct. at 2017 (holding that *Maine v. Taylor's* total expulsion of out-of-state baitfish provided no justification for Alabama's differential tipping fee).

182. *Hunt*, 584 So. 2d at 1389.

183. *Id.*

184. *Id.* The Alabama Supreme Court quoted the findings of the trial judge:

> It is without dispute that the waste and substances being landfilled at the Emelle facility include substances that are inherently dangerous to human health and safety and to the environment. Such waste consists of ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer-causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death. Should a sudden or non-sudden discharge or release occur, hazardous wastes could pollute the environment, contaminate drinking water supplies, contaminate the ground water, and enter the food chain. Among these are arsenic, mercury, lead, chromium and cyanide. These wastes are generated by an entire spectrum of industry.

Id.

that hazardous waste was significantly more dangerous than the articles at issue in the quarantine cases.[185]

The U.S. Supreme Court granted certiorari, but limited review to the $72 tipping fee on out-of-state waste.[186] The Supreme Court determined that on its face, the tipping fee constituted economic protectionism and violated the Commerce Clause because the fee was directly related to the waste's origin. Quoting *Philadelphia*, the Court stated, "[t]he evil of protectionism can reside in legislative means as well as legislative ends."[187] The Court also stressed precedent that prohibited states from taxing out-of-state commodities at a higher rate than in-state commodities.[188] Although the Supreme Court recognized the validity of the legislative goals,[189] it refused to acknowledge the constitutionality of the differential tax structure because the waste was not taxed evenhandedly.[190]

Although the Supreme Court refused to uphold the legislation's validity, it recognized certain dangers associated with hazardous waste.[191] The Court dismissed applicability of the quarantine exception[192] because the tipping fee would have no impact on in-state hazardous waste regulation, and because importation of out-of-state waste would still be allowed, although subject to an additional fee.[193] The Court then listed alternative means by which Alabama could regulate hazardous waste: require an additional per-ton tipping fee on all hazardous waste disposed of within Alabama;[194] impose a per-mile tax on all vehicles transporting hazardous waste across Alabama

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185. *Id.*

186. Hunt v. Chemical Waste Management, 112 S. Ct. 2009, 2012 (1992).

187. *Id.* (quoting Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978)).

188. *Id.* at 2014; *see* Armco, Inc. v. Hardesty, 467 U.S. 638 (1984); Walling v. Michigan, 116 U.S. 446 (1886); Guy v. Baltimore, 100 U.S. 434 (1880).

189. The Alabama Supreme Court identified the following interests served by the legislation:

> (1) protection of the health and safety of the citizens of Alabama from toxic substances;
> (2) conservation of the environment and the state's natural resources;
> (3) compensatory revenue for the costs and burdens that out-of-state waste generators impose by dumping their hazardous waste in Alabama;
> (4) reduction of the overall flow of wastes traveling on the state's highways, the flow of which creates a great risk to the health and safety of the state's citizens.

Hunt v. Chemical Waste Management, Inc., 584 So. 2d 1367, 1389 (Ala. 1991), *vacated*, 112 S. Ct. 2009 (1992).

190. 112 S. Ct. at 2013.

191. "[S]uch waste consists of ignitable, corrosive, toxic and reactive wastes which contain poisonous and cancer causing chemicals and which can cause birth defects, genetic damage, blindness, crippling and death." *Id.* at 2011 (quoting the Alabama Supreme Court opinion, 584 So. 2d 1367 (Ala. 1991)).

192. *See supra* notes 36-38 and accompanying text.

193. Hunt v. Chemical Waste Management, 112 S. Ct. 2009, 2016 (1992).

194. *Id.* at 2015; *cf.* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 619 (1981).

roads;[195] and place a cap on the total tonnage disposed of at the Emelle site.[196]

Chief Justice Rehnquist dissented. He thought the regulatory alternatives suggested by the majority discriminated against Alabamians,[197] and cited caselaw that upheld taxation as a mechanism for discouraging the consumption of scarce resources. He refuted the majority's assumption that differential taxes are necessarily unconstitutional.[198] Rehnquist suggested additional alternatives that Alabama could use, including tax subsidies for domestic industries generating hazardous waste and state operation of hazardous waste facilities as a market participant.[199] Rehnquist also reiterated that states are entitled to preserve resources even if they disadvantage out-of-state waste generators.[200]

Ultimately, the Supreme Court dismissed the Alabama Supreme Court's rationale for the tax.[201] The Court further defined *Philadelphia* by extending its scope to include a state tax imposed on hazardous waste imports. Although the Alabama legislation did not prohibit hazardous waste importation, the Supreme Court determined that the statutory impact of imposing an additional fee on out-of-state waste was significant, and justified application of the *Philadelphia* precedent.[202]

III. *PHILADELPHIA V. NEW JERSEY*: IMPERFECT DECISION?

As reflected in the analyzed caselaw, *Philadelphia* has had a significant impact on state efforts to control waste importation. Although *Philadelphia* is renowned for its holding that waste is an article of commerce, the decision fails to address several crucial issues.[203] The Supreme Court's issuing of the 1978 *Philadelphia* opinion when environmental regulation was in its infancy is reflected by the majority's assessment, or lack thereof, of the waste crisis facing the country. The Court approached the case from an economic perspective in determining that New Jersey's ban on out-of-state waste was protectionist in nature. Focusing on the legislation's economic impact, the Court majority addressed neither the dangers associated with

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195. *Id.*; *cf.* American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 286 (1987).

196. *Id.*; *see also* Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978).

197. *Id.* at 2018 (Rehnquist, C.J., dissenting).

198. *Id.*

199. *Id.* at 2019.

200. *Id.* at 2017.

201. Hunt v. Chemical Waste Management, 112 S. Ct. 2009, 2017 (1992).

202. *Id.*

203. For a critical analysis of the *Philadelphia* decision, see Stanley E. Cox, *Burying Misconceptions About Trash And Commerce: Why It Is Time To Dump* Philadelphia v. New Jersey, 20 CAP. U. L. REV. 813 (1991).

hazardous and solid waste nor acknowledged the rationale behind the enactment of solid and hazardous waste regulation.

A. Dangers Presented by Hazardous and Solid Waste Require Pervasive Regulation

Congressional recognition of the need for solid and hazardous waste regulation is reflected in the enactment of the RCRA legislation, which states as the national policy "[W]herever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment."[204]

RCRA proceeds with specific identification of several environmental and health concerns associated with waste including landfill capacity, waste management, and the potential effect on water and air resources.[205] RCRA's legislative history also highlights additional dangers posed by waste disposal: (1) contamination of ground water from leachate; (2) contamination of surface waters by run-off from landfills or dumps; (3) air pollution resulting from open burning,

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204. 42 U.S.C. § 6902(b) (Supp. 1993).

205. The RCRA legislation states with respect to the environment and health, that--

(1) although land is too valuable a national resource to be needlessly polluted by discarded materials, most solid waste is disposed of on land in open dumps and sanitary landfills;

(2) disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment;

(3) as a result of the Clean Air Act, the Water Pollution Control Act, and other Federal and State laws respecting public health and the environment, greater amounts of solid waste (in the form of sludge and other pollution treatment residues) have been created. Similarly, inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health;

(4) open dumping is particularly harmful to health, contaminates drinking water from underground and surface supplies, and pollutes the air and the land;

(5) the placement of inadequate controls on hazardous waste management will result in substantial risks to human health and the environment;

(6) if hazardous waste management is improperly performed in the first instance, corrective action is likely to be expensive, complex, and time consuming;

(7) certain classes of land disposal facilities are not capable of assuring long-term containment of certain hazardous wastes, and to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment, should be the least favored method for managing hazardous wastes; and

(8) alternatives to existing methods of land disposal must be developed since many of the cities in the United States will be running out of suitable solid waste disposal sites within five years unless immediate action is taken.

42 U.S.C. § 6901(b)(1)-(8) (Supp. 1993) (citations omitted).

incineration, evaporation, or sublimation and wind erosion; (4) acute poisoning resulting from improper disposal of hazardous materials; and (5) fires resulting from improper storage of solid waste.[206]

1. Hazardous Waste

Hazardous waste presents additional threats beyond those associated with solid waste. Hazardous waste as identified in RCRA is any solid waste that causes mortality or serious illness, or poses a substantial threat to health or the environment when improperly managed.[207] Congress dedicated an entire section of the record to illustrating problems associated with improper hazardous waste disposal, citing specific cases in which uncontrolled hazardous waste had a detrimental impact on the environment.[208] Many wastes can blind, cripple, or kill.[209]

2. Solid Waste

Although hazardous waste is classified as such because it presents additional dangers beyond the problems associated with solid waste, the serious health and safety consequences of solid waste and its disposal should not be underestimated.[210] A 1986 EPA study revealed that twenty-two percent of the total number of sites proposed for the Superfund National Priorities List (NPL) were municipal landfills.[211] Groundwater contamination caused by leachate runoff threatens human health or the environment at many municipal solid waste landfills. The EPA estimates that 5.5% of municipal landfills expose one out of every 10,000 to 100,000 people to a cancer risk.[212] Approximately 11.6% of existing landfills pose a cancer risk to one out of every 100,000 to 10 million people.[213] Surface water is affected;

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206. *See* H. REP. NO. 1491, 94th Cong., 2d Sess. 89-90 (1976), *reprinted in* 1976 U.S.C.C.A.N 6325-26.

207. *See* 42 U.S.C. § 6903 (5).

208. For instance, in 1974 in Kiskiminetas Township, Armstrong County, Pa., sulfuric acid leached from a mining company's dump into the Kiskiminetas River. About 3,500,000 gallons of leachate were discharged each day containing an estimated 463 tons of acid. In 1974, 200,000 pounds of toxic mercury were dumped at a former plant site in Middlesex County, New Jersey. In the same county, the public water supply was contaminated for two years when stockpiled metals leached into surface ground water. H. REP. NO. 1491, *supra* note 206 at 17-20, *reprinted in* 1976 U.S.C.C.A.N. 6255-57.

209. *Id.* at 5, *reprinted in* 1976 U.S.C.C.A.N. 6238.

210. For a general discussion of dangers of solid waste landfills, see Kirsten Engel, *Environmental Standards As Regulatory Common Law: Toward Consistency in Solid Waste Regulation*, 21 N.M. L. REV. 13 (1990).

211. *Facing America's Trash: What Next For Municipal Solid Waste*, Office of Technology Assessment, OTA-O-424 (October 1989) at 284 [hereinafter *Facing America's Trash*].

212. *Id.* at 285.

213. *Id.* The EPA model, as part of the risk assessment, projects the release, transport, and impact of eight pollutants found in the landfill leachate including vinyl chloride, tetrachloro-

contamination has been discovered at 45% of EPA-moderated, non-NPL landfills, and at 43% of NPL sites.[214] Disease-carrying microorganisms are prevalent at municipal solid waste landfills, as are several dangerous gases, including methane, carbon monoxide, and "numerous organic chemicals in gaseous forms."[215]

In recognition of these dangers, EPA has adopted more stringent criteria for solid waste landfill operation and closure, which were to become effective in October 1993.[216] The new regulations address: "location restrictions; facility design restrictions based on performance goals; operating criteria; groundwater monitoring requirements; corrective action requirements for groundwater contamination; financial assurance requirements for closure, post-closure, and known releases; closure standards; and post-closure standards."[217]

Many current landfills are reaching maximum capacity, yet society's generation of waste shows little sign of slowing. Because waste decomposition is a lengthy process, it is unlikely that a capacity-filled landfill could be used in the future.[218] Decomposition also yields undesirable byproducts, such as leachate runoff and ozone-depleting gases[219]

B. *Alternatives Within the Confines of the Commerce Clause: The* Philadelphia *Influence*

Although *Philadelphia* has severely restricted state efforts, certain alternatives do exist for states attempting to regulate waste importation. *Philadelphia* has established four guidelines. First, out-of-state waste can be pervasively regulated if distinguishable on the basis of its origin.[220] Second, state regulation is not necessarily preempted by federal legislation.[221] Third, an evenhanded cap can be placed on the total amount of waste accepted by a state's landfills.[222] Fourth, a

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ethane, and methylene chloride. Variables influencing the degree of risk include the distance to downgradient wells, infiltration rate, landfill capacity, and aquifer characteristics. *Id.*

214. *Id.* at 286.

215. *Id.*

216. 56 Fed. Reg. 50,978 (1991) (an extension was granted until the spring of 1994).

217. *Facing America's Trash*, *supra* note 211, at 289-90.

218. Archaeologists maintain that decomposable materials can last for centuries under certain conditions. Many landfills contain paper and food wastes remaining in their original state since their disposal twenty years ago. Factors influencing the rate of decomposition include: "moisture content, pH, temperature, degree of compaction, and MSW [municipal solid waste] age, composition, and size." *Facing America's Trash*, *supra* note 211, at 275.

219. *Id.*

220. Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978).

221. *Id.* at 620-21 n.4.

222. *Id.* at 626.

government entity may become involved as a market participant, using state resources to the exclusion of out-of-state entities.[223]

Following the *Philadelphia* decision, the Supreme Court offered several non-discriminatory alternatives to states wishing to regulate waste importation. For example, in *Chemical Waste Management, Inc. v. Hunt*,[224] the Supreme Court offered three alternatives that would affect hazardous waste from all sources, not just out-of-state waste: (1) a per-ton tax applicable to all hazardous waste disposed of within Alabama; (2) a per-mile tax on all vehicles that transported hazardous waste on Alabama roads; and (3) a cap on the total amount of hazardous waste landfilled.[225] In *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Resources*,[226] the Court reaffirmed its position that a state could place a cap on the total amount of waste accepted at landfill operations.[227]

The Court's recommendations did not escape criticism. In his dissent in *Chemical Waste Management Inc. v. Hunt*, Chief Justice Rehnquist concluded that a per-ton tax on all hazardous waste disposed of in-state and a per-mile tax on all vehicles that transported hazardous waste in Alabama would penalize Alabamians through double taxation as general state tax revenues.[228] He argued the additional tax would be directed at both inspection and regulatory functions to ensure proper disposal of hazardous waste.[229] The additional tax would also be directed at safe disposal of the waste. The State contended that the Court's recommended flat fees would fail to alleviate the problems associated with waste disposal; any fee significant enough to deter waste imports would also deter in-state entities from disposing of their waste, thereby impeding proper waste disposal, and endangering Alabama's health and environment.[230]

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223. *Id.* at 627 n.6. RCRA provides for an active state role in the waste regulatory process, allowing the states to apply for authorization to operate a hazardous waste treatment program "in lieu of the Federal program." 42 U.S.C. § 6926(b). State-implemented programs must be "equivalent" and "consistent" with EPA regulations. *Id.*

224. 112 S. Ct. 2009 (1992).

225. *Id.* at 2015; *see supra* part II.B. Although these alternatives were proposed regarding hazardous waste regulation, the same recommendations could be offered for solid waste regulation.

226. 112 S. Ct. 2019 (1992).

227. *Id.* at 2027.

228. *See supra* part II.B.

229. *Hunt*, 112 S. Ct. at 2018.

230. *Id.* at 2015, n.8. The State asserted:

> An equal fee, at any level, would necessarily fail to serve the State's purpose. An equal fee high enough to provide any significant deterrent to the importation of hazardous waste for landfilling in the State would amount to an attempt by the State to avoid its responsibility to deal with its own problems, by tending to cause in-state waste to be exported for disposal. An equal fee not so high as to amount to an attempt to force Alabama's own problems to be borne by citizens of other states

1. Permitting Requirements

In *National Salvage & Service Corporation v. Commissioner of the IDEM*,[231] the Indiana Court of Appeals upheld a state regulation that required all people disposing of solid waste or operating a solid waste processing facility to have solid waste permits.[232] The National Salvage and Service Corporation challenged the constitutionality of the legislation on the premise that it interfered with the company's waste operation by requiring a permit for a warehouse where municipal solid waste was offloaded from railroad cars onto semi-trucks destined for Indiana landfills.[233] The Indiana Court of Appeals held that the warehouse constituted a transfer station, which required a permit in accordance with Indiana law.[234]

2. State Waste Identification

In *Old Bridge Chemicals, Inc. v. New Jersey Department of Environmental Management*,[235] the New Jersey Supreme Court upheld state regulations that expanded the federal definition of "solid waste" to include any material recycled as effective substitutes for commercial products. Essentially, New Jersey was able to regulate recyclable materials by expanding the definition of solid waste to include these items. The state regulations required recyclable hazardous wastes, even those originating out-of-state, to be labeled and identified by an EPA hazardous waste code.[236] Old Bridge Chemical, a New Jersey manufacturing company, challenged the New Jersey regulations, claiming the regulations would deter out-of-state suppliers.[237] The

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> would fail to provide any significant reduction in the enormous volumes of imported hazardous waste being dumped in the State. At the point where an equal fee would become effective to serve the State's purpose in protecting public health and the environment from uncontrolled volumes of imported waste, that equal fee would also become an avoidance of the State's responsibility to deal with its own waste problems.

Id. (quoting Brief for Respondents at 46).

231. 571 N.E.2d 548 (Ind. Ct. App. 1991), *cert. denied*, 113 S. Ct. 205 (1992).

232. *Id.*

233. 571 N.E.2d at 549-50.

234. *Id.* at 549. The court noted that the statute prohibits the discharge of waste that causes pollution or the deposit of waste material except through the use of sanitary landfills, incineration, composting, garbage grinding or other accepted method. *Id.*

"Transfer station" was defined as "a facility at which solid waste is transferred into larger capacity vehicles or containers for further transportation but shall not include neighborhood recycling collection centers or transfer activities at generating facilities." IND. CODE r. 2-2-1 (58).

The Indiana legislature clarified the ambiguous definition of "transfer station" as a facility where solid waste is transferred from a vehicle or a container to another vehicle or container for transportation. The term does not include facilities where the solid waste that is transferred has been generated by the facility, or recycling facilities. IND. CODE 13-7-1-24.5

235. 965 F.2d 1287 (3d Cir.), *cert. denied*, 113 S. Ct. 602 (1992).

236. *Id.* at 1289.

237. *Id.* at 1290.

court ultimately held that the State's regulations survived the *Pike* balancing test because they were evenhanded in application and did not constitute "simple protectionism."[238]

3. Additional Fees For a Legitimate Government Purpose

The Supreme Court has consistently reaffirmed its position that a governmental entity may impose an additional fee upon interstate commerce if it is directed at compensating a legitimate activity. The Court has recognized that it "was not the purpose of the [C]ommerce [C]lause to relieve those engaged in interstate commerce from their just share of the state tax burden even though it increases the cost of doing business."[239] Thus, a state can pass on the cost of waste inspection to a waste importer through a tipping fee[240] if the need for inspection is established and the fee reflects the actual and reasonable cost of inspection.[241]

4. Government As a Market Participant

Among the most effective alternatives to blanket legislative restrictions on out-of-state waste is the market participant exception to the Commerce Clause.[242] The exception's advantage is that regulation of in-state and out-of-state waste need not be evenhanded in application.[243] As a market participant, the state or local government functions in a service capacity. It is subject to the same regulation as private market competitors and therefore is entitled to exercise the same rights as a private competitor.

The market participant exception is traceable to *Hughes v. Alexandria Scrap Corporation*,[244] which upheld the constitutionality of a

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238. *Id.* at 1294.

239. Department of Revenue v. Association of Wash. Stevedoring Cos., 435 U.S. 734, 745 (1978) (quoting Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288 (1977)).

240. Government Suppliers Consolidating Servs., Inc. v. Bayh, 753 F. Supp. 739, 770 (S.D. Ind. 1990).

241. Dean Milk Co. v. Madison, 340 U.S. 349, 355 (1951); Al Turi Landfill, Inc. v. Goshen, 556 F. Supp. 231, 238-39 (S.D.N.Y), *aff'd*, 697 F.2d 287 (2d Cir. 1982).

242. The market participant exemption should be examined as a real option for waste regulation by state and local government entities. Approximately eighty-six percent of all landfills in this country are publicly owned, the majority by local governments. It should be noted that the ratio of publicly owned versus privately-owned landfills varies from state to state. For example, public and private ownership in Indiana, Kentucky, Michigan, Minnesota, Missouri, Ohio, Pennsylvania, and West Virginia are relatively equal. In addition, public entities, although more numerous, may handle a smaller percentage of the waste. *Facing America's Trash, supra* note 211, at 336.

243. For a general overview of negative aspects of government involvement as a participant in the solid waste arena, see Charles T. DuMars, *State Market Power and Environmental Protection: A State's Right To Exclude Garbage In Interstate Commerce*, 21 N.M. L. REV. 37 (1990); *see also* Christine H. Kellett, *The Market Participant Doctrine: No Longer "Good Sense" or "Sound Law"*, 9 TEMP. ENVTL. L. & TECH. J. 169 (1990).

244. 426 U.S. 794 (1976).

Maryland program favoring in-state scrap processors over out-of-state processors. Although out-of-state processors were allowed to participate in the program, they were required to comply with more stringent documentary requirements than Maryland processors.[245] The Supreme Court rejected the plaintiff's argument that every state action reducing the flow of goods in interstate commerce was a potential impermissible burden.[246] The Court explicitly stated, "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional [sic] action, from participating in the market and exercising the right to favor its own citizens over others."[247]

The Supreme Court expanded the market participant exception significantly with *Reeves, Inc. v. Stake*.[248] The *Reeves* Court upheld South Dakota's right to limit the sale of cement produced by the state-owned and operated cement plant to South Dakota residents. Although South Dakota had a history of selling cement to out-of-state distributors, the State faced a cement shortage in 1978.[249] Due to the shortage, the State Cement Commission reaffirmed a policy of supplying all South Dakota customers first, with all other commitments honored on a first come, first served basis.[250] The Court distinguished South Dakota's policy as one that regulated a complex process as opposed to one that denied a natural resource to other states.[251]

Although the Supreme Court has never addressed the market participant theory in the waste disposal context,[252] several lower

245. *Id.* at 800-01.

246. *Id.* at 805.

247. *Id.* at 810 (footnotes omitted).

248. 447 U.S. 429 (1980).

249. *Id.* at 432.

250. *Id.* at 432-33 (quoting Appellant at 13).

251. Id. at 443-44. Although the market participant theory gives states specific authority, there are restrictions on a state's control of natural resources found within the state. States that have been successful in this area have specified they are exerting authority over a service rather than a natural resource. *See* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984).

252. The Court has, however, left the door open for states considering the market participant theory as a potential option in regulating waste:

> We express no opinion about New Jersey's power, consistent with the Commerce Clause, to restrict to state residents access to state-owned resources, compare Douglas v. Seacoast Products, Inc., 431 U.S. 265, 283-297, . . . with *id.*, at 287-290 . . . (Rehnquist, J., concurring and dissenting); Toomer v. Witsell, 334 U.S. 385, 404 . . . ; or New Jersey's power to spend state funds solely on behalf of state residents and businesses, compare Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 805-810 . . . ; *id.*, at 815 . . . (Stevens, J., concurring), with *id.*, at 817 . . . (Brennan, J., dissenting). Also compare South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 187 . . . with Southern Pacific Co. v. Arizona, 325 U.S. 761, 783. . . .

Philadelphia v. New Jersey, 437 U.S. 617, 627 n.6 (1978).

federal and state courts have found the theory applicable to waste disposal regulations. At issue in *Swin Resource System, Inc. v. Lycomony Company*,[253] was a sliding scale fee structure for disposal of solid waste at a county-owned landfill.[254] Although the petitioner alleged Commerce Clause and Equal Protection violations, the Third Circuit upheld the fee structure, claiming that the county was not subject to Commerce Clause restraints because it was a market participant rather than a market regulator.[255] In *County Commissioners of Charles County v. Stevens*,[256] the Maryland Supreme Court upheld a county regulation that banned disposal of out-of-county solid waste at a county-owned and operated landfill. Although the landfill was the only one located in the county, the court determined that the regulation was legitimately directed at limiting the benefit of landfill service to those taxpayers who paid for it.[257]

The market participant theory has also withstood judicial scrutiny when the state held a monopoly on the waste industry. At issue in *Lefrancois v. Rhode Island*[258] was Rhode Island legislation that explicitly banned disposal of out-of-state waste at a state-subsidized and operated landfill, the only landfill in the State. The district court specifically addressed the State's monopoly on landfill service and determined that Rhode Island was not precluded from favoring its own citizens, because it was a market participant.[259]

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253. 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990).

254. The county had adopted the following set fees:

(1) $10 per ton for waste generated within the county;

(2) $13.25 per ton for waste generated within a 5 1/2 county area;

(3) $30 per ton for waste generated outside the 5 1/2 county vicinity.

Id. at 247.

255. *Id.* at 245; *see* David Wartinbee, Note, Swin Resource Systems, Inc. v. Lycoming County: *Our Barriers to Solid Wastes Are Growing*, 7 COOLEY L. REV. 527 (1990).

256. 473 A.2d 12 (Md. 1984).

257. *Id.*

258. 669 F. Supp. 1204 (D.R.I. 1987). Interestingly, the Central Landfill at issue in *Lefrancois v. Rhode Island* is currently the subject of another controversy. The landfill will close in 1994, in accordance with an agreement between the state and the Town of Johnston. However, a proposal would keep the landfill open past the 1994 closure deadline. The Rhode Island Supreme Court upheld the 1994 closure agreement, but ruled that the Solid Waste Management Corporation, a public state corporation, may open three new landfill cells adjacent to the existing 121-acre landfill. Currently, the Central Landfill has waste piled 300 feet high. *Rhode Island Landfill Faces Uncertain Future in Wake of Local Opposition*, 8 ENVTL. PROTECTION NEWS 10, 11 (February 8, 1993).

259. 669 F. Supp. at 1212. *But see* Steven D. Devito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I. 1991) (enjoining state regulation that required all solid waste originating or collected in-state to be disposed of at a state-licensed facility).

IV. CONCLUSION

Waste disposal remains a serious problem for states attempting to cope with their own waste generation as well as with the influx of waste from other states who are either avoiding responsibility for their waste or simply have run out of landfill space. State efforts to regulate out-of-state waste have often resulted in litigation. As evidenced in the analyzed case law, many states have been creative in their attempt to limit waste importation. Still, no clear regulatory standard exists.

The Supreme Court has attempted to define the constitutional parameters for state and local waste regulation through *Philadelphia, Fort Gratiot,* and *Chemical Waste Management v. Hunt,* and will further define the area this term.[260] Although the Supreme Court will continue to address waste importation, Congress must implement legislation to clarify the issue.[261] Through RCRA, Congress has attempted to regulate solid and hazardous waste, but progress and advanced technology will inevitably demand amended legislation to address state accountability for waste disposal.

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260. On May 24, 1993, the Supreme Court agreed to review C & A Carbone, Inc. v. Town of Clarkstown. 605 N.E.2d 874 (N.Y. 1992), *cert. granted,* 113 S. Ct. 2411 (1993). At issue is a local ordinance that requires all processing and handling of solid waste within the town be done at the municipality's designated transfer station before being transferred elsewhere for disposal. *Id.* On September 23, 1993, the Supreme Court consolidated two Oregon cases to review the constitutionality of the state's differential tax structure for in-state and out-of-state waste. 114 S. Ct. 436 (1993); *see supra* note 106.

261. Congress can give the states authority to restrict interstate commerce if the congressional authorization is "expressly stated" and "unmistakably clear." *See* White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983); South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984). The Supreme Court's invalidation of the take title provision of the federal statute in New York v. United States, 112 S. Ct. 2408 (1992), provides an interesting twist to Congressional grants of authority.

APPENDIX I

STATE	SOLID WASTE (tons/yr) (%)	RECYCLED (%)	INCINERATED (%)	LANDFILLED
Alabama**	4,500,000	8	3	89
Alaska*	500,000	6	15	79
Arizona^	2,900,000	5	0	95
Arkansas^^	2,000,000	5	7	88
California**	45,000,000	17	2	81
Colorado**	2,400,000	16	0	84
Connecticut*	2,900,000	15	65	20
Delaware*	750,000	8	20	72
Dist. of Columbia*	815,000	7	10	83
Florida*	18,700,000	21	17	62
Georgia*	4,400,000	5	4	91
Hawaii**	1,300,000	4	42	54
Idaho^	850,000	8	2	90
Illinois*	14,600,000	12	2	86
Indiana^^	5,700,000	8	17	75
Iowa**	2,300,000	10	2	88
Kansas*	2,400,000	5	0	95
Kentucky*	3,500,000	10	0	90
Louisiana*	3,500,000	10	0	90
Maine*	950,000	17	45	38
Maryland^^	5,100,000	10	17	73
Massachusetts^	6,800,000	29	47	24
Michigan#	11,700,000	25	19	56
Minnesota^^	4,400,000	31	25	39
Mississippi*	1,400,000	8	3	89
Missouri^	7,500,000	10	0	90
Montana^	600,000	6	1	93
Nebraska*	1,300,000	10	0	90
Nevada*	1,000,000	10	0	90
New Hampshire##	1,100,000	5	23	72
New Jersey*	7,100,000	30	17	53
New Mexico##	1,500,000	5	0	95
New York*	22,000,000	14	13	73
North Carolina^	6,000,000	17	4	79
North Dakota*	400,000	10	0	90
Ohio**	15,700,000	3	8	89
Oklahoma##	3,000,000	10	10	80
Oregon*	3,300,000	21	6	73
Pennsylvania*	9,500,000	10	25	65
Rhode Island*	1,200,000	15	0	85
South Carolina*	4,000,000	5	7	88
South Dakota##	800,000	10	0	90
Tennessee^^	5,000,000	2	9	89
Texas^	18,000,000	10	1	89
Utah*	1,200,000	10	10	80
Vermont*	390,000	20	8	72
Virginia*	9,000,000	10	10	80
Washington*	5,100,000	34	7	59
West Virginia*	1,700,000	10	0	90
Wisconsin*	3,400,000	17	3	80
Wyoming^	320,000	3	0	97

* Commercial, residential, institutional
** Commercial, residential, institutional, sewage sludge, construction, and demolition
^ Commercial, residential, institutional, construction, and demolition
^^ Commercial, residential, institutional, some industrial
# Commercial, residential, institutional, industrial
Commercial, residential, institutional, construction, demolition, industrial

Tom Arrandale, *Talking Trash*, GOVERNING GUIDE, Sept. 1992, at at 38 (citing BioCycle's 1992 Survey of State Solid Waste Officials).